SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967, No. 858

ALBERT W. BAXTER ET AL., *Appellants*,

v.

CITY OF PHILADELPHIA ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Pennsylvania entered on June 29, 1967, affirming the judgment entered by the Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 426 Pa. 240 (infra, p. 33).

Copies of the opinions of the Court of Common Pleas on preliminary objections (infra, p. 19), motion for judgment on the pleadings (infra, p. 23) and the opinion of the Supreme Court of Pennsylvania on appeal from the denial of the motion for judgment (reported in 385 Pa. 424; infra, p. 26) the findings and verdict of the trial judge in the Court of Common Pleas (infra, p. 28) and the opinion of the Court of Common Pleas, sitting en banc (infra, p. 30) dismissing exceptions to the findings of the trial judge are attached hereto in the Appendix.

JURISDICTION

This action of mandamus was brought by the members of the executive board of the Fraternal Order of Police as a class action against the City of Philadelphia and certain of its officers. The judgment of the Supreme Court of Pennsylvania was entered on June 29, 1967 and notice of appeal was filed in that Court and in the Court of Common Pleas of Philadelphia County on September 27, 1967.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, sections 1257(2) and 2101(c).

Cases Believed to Sustain Jurisdiction

1. *Invalid Delegation of Legislative Power.*

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446, it was held that any legislative enactment which vests in a person or body of persons free of any standards independent of his or their own mind and judgment, the power of supplying or giving force to or suspending its terms is unconstitutional as a delegation of the power exclusively in the legislature.

In creating an administrative agency, the legislature must enjoin upon it a certain course of proceeding and certain rules of decision in the performance of its functions in order to prevent a delegation of legislative power. *Roach v. Johnson*, 48 F. Supp. 833, 834, 835. *Wichita R. & Light Co. v. Public Utilities, etc.*, 260 U. S. 48, 43 S. Ct. 51, 55, 67 L. Ed. 124. *Schechter Poultry Corp. v. United States*, 295 U. S. 495.

Neither the enabling act nor the Philadelphia Home Rule Charter prescribed rules for the guidance of the Civil Service Commission. It established no criteria to govern the course of the Commission in issuing the regulations

pertaining to pay and hours of work. It did not require any findings by the Commission as a condition of its action. Neither the enabling act nor the Charter declared any policy as to classification, wages and hours, which are pure legislative functions. The Commission was given unlimited authority to determine the policy as to these important items as the Commission might deem fit.

The general outline of the purposes of the Charter contains nothing as to classification, wages and hours. There is declared no policy of limitation. It is important to note that the Emergency Civil Service Regulations and Supplemental Regulation A were prepared by the Civil Service Committee of the Committee of Seventy, a private civic organization having no official connection with the City or the Commission, and it was this Committee that gave the regulations its "emergency" name weeks before they were put into effect on the effective date of the Charter (Record, pp. 221a-239a).

As stated in *Panama* (p. 418):

> "It is manifest that this broad outline is simply an introduction of the Act, bearing the legislative policy as to particular subjects declared and defined, if at all, by the subsequent sections."

The Home Rule Charter left to the Civil Service Commission, without standard or rule, legislative functions to be dealt with by the Commission as it pleased. It was an attempt to commit the functions of a legislative body rather than those of an executive or administrative officer executing a declared legislative policy. There is nothing in the Charter which limits or controls the authority conferred by Section 7-400 on the Commission.

The legislature cannot abdicate or transfer to others the essential legislative functions with which it is vested. It can, of course, perform its function by laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within

prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

What is involved here is the constitutional processes of legislation which are an essential part of our system of government.

The Commission regulations contain no finding, no statement of the grounds for its action in fixing the hours of work and pay. It is clearly the result of unfettered discretion and is therefore invalid. It invests the Civil Service Commission with uncontrolled legislative power.

Due process of law requires that it shall appear that the regulations are within the authority of the Commission and, if that authority depends on determinations of fact, those determinations must be shown by an express finding. In the absence of such finding, the regulations of the Commission with respect to hours and pay is without constitutional authority.

As the Court stated in *Schechter*, the Commission was given "a roving commission" to fix hours of work without any "standard, definite or even approximate, to which legislation must conform." (Mr. Justice Cardozo, concurring opinion, *Schechter* (p. 551-552).) This was an abdication of legislative power. The Commission could not use it as it could not exercise legislative powers.

2. *Violation of Due Process and Equal Protection of the Law Clauses of the 14th Amendment.*

The unfair discrimination by the regulations in requiring the police to work 48 hours while all other city employes worked a 40-hour week, without any plausible and valid basis was arbitrary, capricious and unreasonable. *Healy v. Ratta*, 67 F. 2d 554, reversed on other grounds, 292 U.S. 263.

The Commission can exercise only ministerial powers, not legislative powers. While state and municipal bodies may be limited in scope and may be adjusted to differences in things and situations, it may not make any arbitrary

or unreasonable distinction or discrimination, but must accord substantially equal and uniform treatment to all persons similarly situated. Any distinction must be based on substantial differences. None were shown, found or alluded to by the Commission in requiring policemen to work substantially longer hours than all other city employees. The constitutional inhibitions against such discrimination are too important and valuable to be frittered away in this unrestrained manner. Fairness in classification is still a virtue. *Atlantic Pipe Line Co. v. Brown County*, 12 F. Supp. 642, 646 (D.C. Tex.).

The Commission made no finding and the City presented no evidence to support any valid distinction between policemen and other city employees to warrant discrimination against policemen. If anything, the policemen should be favored. The policemen's lot is not a happy one, particularly in these troubled times. The Court below justifies its position on this discrimination by stating:

> "Government must have broad discretion in adjusting incentives for public employees if it is to compete successfully in the labor market to provide adequately and economically services essential to the public weal." (P. 253 of opinion, Supreme Court of Pennsylvania).

It is difficult to see what incentive it would be to any young man aspiring to be a policeman to realize he would be required to work longer hours at less pay them all other city employees. Its cited authority, *Iben v. Monaca Borough*, 158 Pa. Superior Ct. 46, 43 A. 2d 425 (1945), holds exactly opposite to the professed concern. The practical effect has been that this discrimination in the matter of hours of work and pay has made the recruitment of qualified police officers in Philadelphia a most difficult one.

Class legislation discriminating against some and favoring others is prohibited. Classification must embrace all who belong in the same category and may not be capricious or arbitrary. *Pfeiffer Brewing Co. v. Bowles*, 146

F. 2d 1006 (1945); *McLaughlin v. State of Florida*, 85 S. Ct. 283.

A city policeman is a city employee. In the matter of hours of work, he should not be treated differently than other city employees. Police work is a highly hazardous occupation, with injury or death as a constant companion. The risks are many and the rewards few. Singling out the policemen for this kind of discrimination cannot be justified either legally or morally. A public servant should be entitled to protection under the due process clause where his exclusion from legislative provisions is arbitrary, capricious and unreasonable. *Weiman v. Updegraff*, 344 U.S. 183.

3. *The Regulations Impaired the Obligation of Contract.*

It is a cardinal rule of construction that repeals by implication are not favored and it is presumed that an ordinance or statute has not been repealed. Accordingly, in the absence of an express repealer the indication of an intention to effect a repeal of prior legislation must be clear and compelling. *Parisi v. Phila. Zoning Board*, 393 Pa. 458, 143 A. 2d 360.

Applying these decisions to the ordinances of October 29, 1951 and January 2, 1952, Supplemental Emergency Regulation A as well as the applicable section in the Civil Service Regulations of December 30, 1952 did not effect a repeal of said ordinances.

Supplemental Emergency Regulation A attempted to revive that part of a Council Ordinance relating to hours of work which were validly repealed by the Ordinance of October 29, 1951, as amended by the Ordinance of January 2, 1952. Even assuming the validity of this regulation, which is denied, it could not either amend or revive a dead ordinance provision. *McQuillin, Municipal Corporations*, p. 183, section 21.05.

Where an ordinance is void, and, in legal contemplation, inoperative as though it had never been passed, a later ordinance purporting to amend it likewise is void

and of no effect. *Dean Milk Co. v. Aurora*, 404 Ill. 331, 88 N. E. (2d) 827.

When the 40-hour week ordinance went into effect, the appellants acquired certain contract or vested rights. Since an ordinance cannot impair the obligation of a contract or violate a property or any constitutional right, it follows that the repeal of an ordinance cannot deprive a person of rights acquired under it or prejudice him in those rights and thereby deprive him of his property without due process of law, impair the obligation of his contract, unreasonably discriminate against him and otherwise violate his constitutional rights. *McQuillin, Municipal Corporations*, p. 196, sec. 21.15. See *Johnson v. U.S.*, 39 F. Supp. 208.

The rule against giving statutes retroactive effect is equally applicable to municipal ordinances. *Appeal of Saidey*, 369 Pa. 19, 85 A. 2d 28; *City of Philadelphia, to use of Polselli v. Phillips*, 179 Pa. Superior Ct. 87, 116 A. 2d 243; *Appeal from Ordinances of Neville Twp. No. 388*, 103 P. L. J. 167. (The Court held the repeal of an ordinance ineffective against vested right acquired or any claim arising under repealed ordinance.)

An ordinance may not be declared invalid on the ground that the council adopting it was improperly motivated unless its action was induced by bribery or fraud. It is the result that is controlling. *In re Ordinance No. 203 of Barnsborough Bor.*, 59 Pa. D. & C. 495, 39 Pa. Mun. Law R. 19.

This is the law in virtually every state in the Union. *Ex Parte Finley*, 246 Ala. 218, 20 S. 2d 98; *City of Chicago v. Waters*, 363 Ill. 125, 1 N. E. 2d 396; *American Grocery Co. v. Board of Commissioners of City of New Brunswick*, 124 N. J. L. 293, 11 A. 2d 599; aff. 126 N. J. L. 367, 19 A. 2d 696; *Madison v. City of Maryville*, 173 Tenn. 489, 121 S. W. 2d 540; *People v. Stover*, 240 N. Y. S. 2d 734, 12 N. Y. 2d 462, 191 N. E. 2d 272; *Brairton v. Gillette*, 244 N. Y. S. 2d 513; *State, ex rel. McGonigle v. Madison Circuit Court*, 193 N. E. 2d 242; *Oscar P. Gustafson Co. v. City of Minneapolis*, 42 N. W. 2d 809.

Statutes Involved

Philadelphia Home Rule Charter

Article I, Section 1—100

Article I, Section 1—101

Article III, Section 702 (3)

Article VII, Section 7—400;

Section 7—401 (a) (b) (r)

Article VIII, Section 8-407

Appendix to Charter, Section A-110

Philadelphia Emergency Civil Service Regulations

Regulation XIX

Regulation XXVII, Section 2

Supplemental Regulation A

Civil Service Regulation of December 30, 1952—

Regulation VI, Section 9

Regulation XIX

Constitution of the United States

Article I, Section 10

Amendment XIV, Section 1

Constitution of Commonwealth of Pennsylvania

Article III, Section 7

Philadelphia City Ordinances

October 29, 1951 and January 2, 1952.

Questions Presented

1. Are Regulation XIX of the Philadelphia Emergency Civil Service Regulations, Supplemental Regulation A and Regulation XIX of Civil Service Regulations of December 30, 1952 in violation of due process of law provision of the Fourteenth Amendment of the Constitution of the United States as an attempted exercise of an invalid and unlawful delegation of legislative power?

2. Are Regulation XIX of the Philadelphia Emergency Civil Service Regulations, Supplemental Regulation A and Regulation XIX of Civil Service Regulations of December 30, 1952 in violation of the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States in that it arbitrarily and capriciously discriminated against and required policemen and park police to work longer hours than all other city employees (except firemen) without just and proper compensation?

3. Are Regulation XIX of the Philadelphia Emergency Civil Service Regulations, Supplemental Regulation A and Regulation XIX of Civil Service Regulation of December 30, 1952 in violation of the due process of law provision of the Fourteenth Amendment of the Constitution of the United States in that they impaired the obligation of contract between the police and the City of Philadelphia?

Statement of the Case

This is an action in mandamus to compel the City of Philadelphia and certain officials thereof to reinstate the 40-hour work week for policemen and park police, and to compensate the appellants and all other policemen, park police and policewomen for time worked over 40 hours a week since January 7, 1952. The basis of the amended complaint is an ordinance of City Council approved by the then Mayor of Philadelphia, Bernard Samuel, on October 29, 1951, which ordained that the standard work week of employees of the City of Philadelphia "shall consist of 5 work days." This ordinance was subsequently amended by City Council on January 2, 1952, and likewise approved by Mayor Samuel, which amendment set forth that "on and after January 1, 1952, the standard work week of the employees of the City of Philadelphia, and of the departments, bureaus, boards, commissions and other agencies thereof shall consist of 40 hours of work."

Immediately after the amendment was approved, the appellants and all other policemen, park police and policewomen, who were then working on a 48-hour week, were placed on a 40-hour work week, at an annual salary of $4,000. On January 7, 1952, the Philadelphia Home Rule Charter went into effect and a new administration came into office.

On said date, the appellants were ordered by the Police Commissioner, one of the appellees herein, to return to a 48-hour work week. This action was approved by the other appellees.

This was put into effect by the approval by the Civil Service Commission on January 7, 1952 of Philadelphia Emergency Civil Service regulations and Supplemental Emergency Civil Service Regulation A.

Regulation XIX of the said Philadelphia Emergency Civil Service Regulations provided that "soon after his appointment, the Personal Director shall submit to the

Commission a plan for hours of work, holidays, annual vacation and sick leave, which shall apply in the various classes of positions in the civil service." This regulation also provided that after approval of the plan by the Commission, the plan "shall be submitted to the Administrative Board for final action."

Regulation XXVII, section 2, of the Philadelphia Emergency Civil Service Regulations provided as follows:

> "Section 2. Existing Pay Plan
>
> "Until a pay plan as prescribed in these emergency regulations has been prepared and adopted, the pay plan in effect immediately prior to January 7, 1952 shall operate as the pay plan prescribed in these regulations."

Supplemental Emergency Regulation A provided that: "Commencing January 7, 1952 the hours of work and the rates of pay and the determination of compensation of all city employees shall be as legally established on October 26, 1951. This supersedes section 2 entitled 'Existing Pay Plan' of Regulation XXVII of the Emergency Regulations."

Appellants contended (paragraph 13) that the Emergency Civil Service Regulations and Supplemental Regulation A were prepared and approved at the same time and were vague, inconsistent, contradictory and ineffective to repeal the Ordinances of Council dated October 29, 1951 and January 2, 1952.

Appellants also contended that these regulations were null and void because the advertisements of said regulations failed to give adequate public notice by advertisement of the filing of said regulations and did not adequately inform the public of the particular subjects which were the subject matter of said regulations and did not adequately inform the Appellants of the contents of said regulations.

The amended complaint further averred that the Philadelphia Emergency Civil Service Regulations, Supple-

mental Regulation A, and the civil service regulations of December 30, 1952 were invalid because they were placed into immediate effect on January 7, 1952 and January 1, 1953, respectively, instead of being on file with the Department of Records for a period of 30 days, before going into effect, as required by the Charter, on the ground of the declaration by the Mayor that an emergency existed affecting the public health and safety, when in fact no such emergency existed. (At the trial, appellees offered no evidence as to the existence of an emergency affecting the public health and safety. Appellants offered testimony by the former Director of Public Safety, which had control over the police department, that there was no emergency affecting the public health or safety on January 7, 1952 or January 1, 1953. It was stipulated that certain police officers, present in court, would testify to the same effect.)

The amended complaint averred that Section A-110 of the Appendix to the Philadelphia Home Rule Charter provides: "the provisions in this Charter so far as they are the same as those of existing statutes or ordinances shall be construed as a continuation of such statutes or ordinances and not as new enactments." By reason of this provision, the ordinance of Council of October 29, 1951, and its amendments on January 2, 1952, remained in full force and effect on January 7, 1952, when the Charter went into effect, and the ordinances have never been repealed.

Section 3-702(3) of the Philadelphia Home Rule Charter provides:

> "Notwithstanding any other provisions of this chapter, the compensation of persons presently employed by the City shall be according to the presently existing classification and pay scale until civil service regulations are adopted as provided in this charter after which all persons subject to the civil service regulations shall be employed and compensated in accordance with such regulations."

The Civil Service Commission did not formally approve a detailed set of regulations, including Regulation XIX, which dealt with classification of positions, pay scales, hours of work, holidays, vacation and sick leave, until December 30, 1952. Under said regulations, the appellants were continued in their 48-hour work week schedule. All other non-uniformed forces who were not already working a 40-hour week were then placed on a 40-hour work week basis; some were working 37½ hours per week. Some were working a 40-hour week by virtue of an agreement with a union (American Federation of Labor).

Appellants asserted that Regulation XIX, Supplemental Emergency Regulation A and Civil Service Regulations of December 30, 1952 were ineffective to repeal the ordinances of City Council of October 29, 1951 and January 2, 1952; that the regulations were contrary to Article 8, Section 7 of the Constitution of the Commonwealth, in that they were class legislation which granted special privileges to city employees other than policemen and park police; that the regulations violated the due process clause of the Fifth Amendment, and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; that the Regulations were arbitrary, unreasonable and capriciously discriminated against policemen and park police when they required them, as distinguished from other city employees, to work a longer work week without just compensation.

The Emergency Civil Service Regulations and Supplemental Regulation A were placed into immediate effect on January 7, 1952 upon the effective date of the Charter instead of being held in abeyance for 30 days as required by the Charter because of an alleged emergency affecting the public health and safety declared by the Mayor upon the suggestion of the Personnel Director and Civil Service Commission. The Regulations of December 30, 1952 were similarly placed into immediate effect.

Preliminary Objections to the complaint were dismissed. The Appellees then filed an answer asserting that

the Civil Service Regulations effectively repealed the ordinances of Council providing for a 40-hour week, that no appropriations were made by Council to pay for the 40-hour week, that Appellants were guilty of laches and that *O'Donnell v. City*, 385 Pa. 79, was res adjudicata of the issues. The defense of laches and res adjudicata were not alluded to by the Court below in its opinion. Appellants' motion for judgment on the pleadings was denied and the denial was affirmed by the Supreme Court of Pennsylvania (385 Pa. 424).

A trial by a judge without a jury resulted in a verdict for the appellees. Exceptions to the findings and conclusions of law were dismissed and judgment was entered for the appellees. The Supreme Court of Pennsylvania affirmed the judgment.

In affirming, the Supreme Court of Pennsylvania held that the Emergency Civil Service Regulations, Supplemental Regulation A and the Civil Service Regulation of December 30, 1952 were valid and effectively repealed the ordinances of Council of October 29, 1951 and January 2, 1952.

This appeal is based on the holding by the Supreme Court of Pennsylvania that the Emergency Civil Service Regulations, Supplemental Regulation A and the Civil Service Regulations of December 30, 1952 were legislative enactments which effectively repealed the ordinances of the City Council of Philadelphia which, by ordinance, fixed the work week at 40 hours for all city employees. The Supreme Court of Pennsylvania in *O'Donnell v. City*, 285 Pa. 79 (1956), upheld the validity of said ordinances, but only for a period of one week until the promulgation of the said regulations.

The Federal Questions Are Substantial

This question of discrimination as to hours of work and pay is of interest not only to the 5,000 police officers of the City of Philadelphia but to police officers all over the country. The police of Philadelphia in particular have established an outstanding record in the performance of their duties under the most trying conditions. Their plea that they should not be discriminated against in the matter of hours of work and pay and be treated like all other city employees is not unreasonable. It is simply a question of fair play.

The hours of work for police were reduced to 44 hours, then to 42 hours which presently prevail. Contrary to the Appellees' contention that the police, even if continued on a 40-hour work week, as all other city employees, they would have been required to work 48 hours weekly to maintain the same coverage and no appropriation for this overtime had been made by City Council, subsequent events have disproved the fallacious argument. No difficulty has been experienced in maintaining police coverage under the reduced work hours of 44 hours and 42 hours. The only exceptions have been in emergencies created by civil disorder which also occurred in many other urban areas. The overtime hours worked by the police in those emergencies were compensated by transfers, at the end of the year, of unexpended funds from other departments of the city. This practice was common before the new Charter went into effect and is common today.

In 1964 a total of $1,283,000 was transferred from unexpended funds of other departments to the police department for overtime services rendered by the police during emergencies. (Ordinance of City Council of City of Philadelphia approved December 8, 1964.) No appropriation had been made by City Council for this overtime in the municipal budget ordinance for that year.

In 1965, $200,000 was transferred by City Council from unexpended funds of other departments to the Police

Department for overtime personal services rendered by the police. City Council also transferred $502,500 from unexpended funds of other departments to the Police Department for materials, supplies and equipment (Ordinances of City Council approved June 17, 1965, December 1, 1965 and December 13, 1965). No previous appropriation for these purposes had been made by City Council in the budget ordinance for 1965.

Similarly, without prior containment in the budget ordinance of 1966, City Council transferred unexpended funds appropriated to various City Departments to the Police Department totalling $1,034,354, of which $932,854 were for personal services representing overtime pay.

(Ordinance of City Council approved December 22, 1966.)

On November 9, 1967, an ordinance was introduced in City Council transferring $247,500 from the Department of Public Property to the Police Department for overtime pay. Approval by City Council is expected. Additional funds will be needed for this purpose.

Had the police been continued on the 40-hour work week on January 7, 1952, any overtime, if necessary (and no necessity was proved by appellees for the years 1952-1963), could have been compensated by unexpended funds in the appropriation to the Police Department alone. If necessary, additional transfers from other departments could have been made as were made for the years 1964, 1965 and 1966. In addition, clear authority was contained in the Charter (Article II, Section 2-300 (6), Section 2-301 (a)), authorizing City Council to approve deficiency appropriations for the year 1952, the first year of operation under the new Charter.

Appellees' financial witness admitted, however, that if the police had continued to work a 40-hour week, the appropriations of Council were sufficient to pay for it. No transfers and no deficiency appropriation, except for emergencies, would have been required.

It is respectfully submitted that for all the foregoing reasons a hearing should be granted to appellants herein and permission given for the filing of further briefs and oral argument.

Respectfully submitted,

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Appendix A

OPINIONS BELOW

Opinion of the Court of Common Pleas of Philadelphia County, Pennsylvania, Sur Defendants' Preliminary Objections and Order

Before Kun, P. J., Hagan and Griffiths, J.

GRIFFITHS, J.

Plaintiffs, firemen and policemen of the City of Philadelphia, brought a mandamus suit against the City to compel their restoration to a forty hour week from a forty-eight hour week, and to compel the payment of back wages since January 7, 1952.

On October 29, 1951 the Mayor of the City approved an ordinance of City Council providing that the standard work week of city employees "shall consist of five work days." By subsequent amendment, effective January 1, 1952, the standard work week was ordained to "consist of forty hours of work." Immediately thereafter Plaintiffs and all other policemen, park guards and policewomen who were then working on a forty-eight hour week, were placed on a forty hour work week.

On January 7, 1952, the effective date of the Philadelphia Home Rule Charter, Plaintiffs and others were ordered by the new city administration to return to a forty-eight hour work week.

The alleged basis for the action by the administration was Emergency Regulation A and Regulation 19 of the Philadelphia Emergency Civil Service Regulations which, it claimed, superseded the ordinance placing Plaintiffs and others on a forty hour work week. This argument was heretofore presented to us by Defendants in Preliminary Objec-

tions. Also argued at that time was the contention that Defendants could not be liable because City Council had made no appropriation of monies for reduction of the work week time.

This Court overruled the objections because they were affirmative defenses and should have been pleaded as such by way of an answer to the Complaint. At the same time, however, Plaintiffs were ordered to amend their Complaint and plead the above issues in order that the case might thereafter be decided on preliminary objections. Therefore, it must be borne in mind that although Plaintiffs have pleaded the questions of appropriation and subsequent repealer legislation, Defendants nevertheless have the burden of proving same.

Defendants now file a second set of preliminary objections in the form of a demurrer as follows: 1. The Complaint does not set forth a cause of action; 2. The ordinances of October 29, 1951 and January 2, 1952 have been superseded by the civil service regulations adopted under and pursuant to the Home Rule Charter, and 3. The Complaint fails to set forth facts sufficient to show appropriations by City Council to cover the cost of a forty hour regular work week for Plaintiffs and others similarly situated.

The third reason is also asserted as a basis for a motion for a more definite statement.

The first reason for demurrer will stand or fall on the other two; therefore we shall not discuss it separately.

In considering the effectiveness of Emergency Regulation A and Regulation 19, the subjects of Preliminary Objection Number 2, Plaintiffs argue, inter alia, 1. the Philadelphia Emergency Civil Service Regulations were invalid because they were not approved by the Administrative Board as required by Section 7-400 of the Philadelphia Home Rule Charter and 2. an emergency did not in fact exist when the Regulations were promulgated.

We do not see how we can resolve the answers to these two contentions of Plaintiffs on the basis of the pleadings

alone as we would have to do were we to dispose of the case on Defendants' Preliminary Objections. In our opinion evidence will have to be presented at a trial on the merits before we can dispose of this phase of the case.

Defendants' third preliminary Objection, regarding the question of appropriations by City Council presents another problem and if it is established by the pleadings that no such appropriation was made we can determine the legal consequences of such failure. We reiterate that in our opinion the burden of pleading and proving there was no appropriation is upon the Defendants as we regard the same as an affirmative defense.

The operating budget ordinances for the 1952 fiscal program contained a flat appropriation for personal services in the Department of Public Safety or its successors under the Home Rule Charter, including the Police Department, the Fire Department and others in the amount of $31,000,842.26. Similar appropriations under the title "Personal Services" were made by City Council for subsequent years. Defendants contend that the $31,000,842.26 was not in fact sufficient to pay Plaintiffs and similar employees on the basis of a forty hour week. On this point we feel the same cannot be ascertained except upon taking of testimony. Defendants' contention that a forty hour week would compel overtime payments for personal services and that an appropriation for the payment of salaries in general is not the same as an appropriation for the payment of overtime, assumes an answer to the main question favorable to Defendants, viz, that the ordinances providing for a permanent forty hour week were effectively repealed and any work week of less than forty-eight hours would constitute overtime payments.

Since the burden of proof regarding the appropriation question is upon the Defendants we cannot sustain their motion for a more definite statement in this respect by the Plaintiffs.

Therefore we enter the following

ORDER

And now, this 12th day of September, 1955, Defendants' Preliminary Objections 1, 2, 3 and 4 are overruled and Defendants are granted leave to file an answer to Amended Complaint within twenty (20) days from the date hereof.

By the Court
GRIFFITHS, J.

Opinion of the Court of Common Pleas of Philadelphia County, Pennsylvania, Sur Plaintiffs' Motion for Judgment on the Pleadings in Accordance With Supreme Court of Pennsylvania Rule 43

January 24, 1956.

GRIFFITHS, J.

Plaintiffs have appealed from an order of the Court dated October 11, 1955, denying their motion for judgment on the pleadings. Therefore, the Court, pursuant to the requirements of Pennsylvania Supreme Court Rule 43, here sets forth the reasons for dismissing the motion.

The facts of this case, which are more fully set out in an opinion and order of the Court dated September 12, 1955, dismissing Defendants' preliminary objections to Plaintiffs' amended complaint, are these:

Plaintiffs, firemen and policemen of the City of Philadelphia, instituted an action in mandamus against the City to compel their restoration to a forty-hour week from a forty-eight hour week and to compel the payment of certain back wages alleged to be due them.

Plaintiffs base their cause of action on the provisions of an ordinance of City Council dated October 29, 1951, as amended January 1, 1952, which ordinance, inter alia, placed the Plaintiffs on a forty-hour week.

On January 7, 1952, the effective date of the Philadelphia Home Rule Charter, Plaintiffs and others were ordered by the new city administration to return to a forty-eight hour week.

Defendants, in their answer to Plaintiffs' amended complaint, plead two affirmative defenses, namely (1) that Emergency Regulation A and Regulation 19 of the Philadelphia Emergency Civil Service Regulations superseded the ordinance placing Plaintiffs and others on a forty-hour week, and (2) Defendants could not be liable because

City Council had made no appropriation of monies for the reduction of the work week time.

These defenses raise issues of fact, which, in the opinion of the Court, could not be disposed of by preliminary objections, as the Defendants requested heretofore, or by a motion for judgment on the pleadings, as the Plaintiffs here request.

One illustration of this is found in paragraph 26 of Plaintiffs' amended complaint wherein Plaintiffs aver that the Philadelphia Emergency Civil Service Regulations, Supplemental Emergency Regulation A and Civil Service Regulations dated December 30, 1952 (upon which Defendants rely) were invalid in that no emergency existed affecting public health or safety which authorized the suspension of the requirements of Section 8-407 of the Philadelphia Home Rule Charter. Defendants deny this allegation in their answer.

Having found that the complaint raises issues of fact which are denied in the answer and having further found that such denials were specific and not general the Court dismissed Plaintiffs' motion for judgment on the pleadings.

By the Court
GRIFFITHS, J.

Final Order of the Court of Common Pleas of Philadelphia County, Pennsylvania

Oct. 11, 1955, Plaintiffs' motion for judgment against defendants on the pleadings is dismissed.

Opinion of the Supreme Court of Pennsylvania sur Appeal from Order of the Court of Common Pleas Dismissing Plaintiff's Motion for Judgment

(Reported at 385 Pa. 424)

OPINION BY MR. JUSTICE ARNOLD, June 25, 1956:

This action of mandamus was brought against the city and its officials by plaintiffs, who are members of the city's police department. They seek restoration of a 40 hour week, as against the 48 hour week they now work, as well as back wages. The court below denied their motion for judgment on the pleadings, hence this appeal.

Plaintiffs' action rests on two ordinances effective October 29, 1951, and January 2, 1952, which established a 40 hour work week for city employes. Prior to the first of these ordinances, on April 17, 1951, the electors had approved the Home Rule Charter which became effective on January 7, 1952. By authority of provisions of the Charter, civil service regulations provided that wages and hours of employes were to be the same as they were on October 26, 1951. For these plaintiffs the work week on that date was 48 hours.

In their answer to the complaint defendants averred that the civil service regulations superseded the ordinances; that the city had made no appropriation providing funds for payment of the overtime pay claimed; that the action is res adjudicata; and that their action is barred by laches.

As the court below determined, the pleadings raised issues of fact requiring a trial on the merits. If actually established by proof, the failure of the city to provide an appropriation of funds, out of which the claims for wages could be paid, bars recovery: *O'Donnell v. Philadelphia*, 385 Pa. 189, 122 A. 2d 690; *Thiel v. City of Philadelphia*, 245 Pa. 406, 408, 91 A. 490; *Leary v. Philadelphia*, 314 Pa. 458, 472, 172 A. 459. The basis for these decisions rests upon statutes specifically applicable to the City of Phila-

delphia,[1] which provides that no recovery can be had or liability imposed unless there has been an appropriation to provide funds for payment. Provisions of the Home Rule Charter likewise so provide.[2]

The Charter provides, in Section 11-101, that "it shall supersede . . . all ordinances of the City, affecting the organization, government and powers of the City . . . [where they are] inconsistent or in conflict with this charter." Under the Charter wages and hours are fixed by civil service regulations, not by council: See sections 4-300, 7-400, 7-401. This defense was averred by defendants; and plaintiffs' averments of improper procedure, denied by defendants, were not sufficient to allow judgment without proof. Likewise, whether or not the alleged defenses of res adjudicata and laches existed, could be adjudicated only after submission of proof. Judgment on pleadings will be entered only where the case is clear and free from doubt: *Kittaning Coal Company v. Moore*, 362 Pa. 128, 132, 66 A. 2d 273. Under no circumstances could judgment on these pleadings be justified.

As to other matters raised on this appeal, see *O'Donnell v. City of Philadelphia*, supra.

Judgment affirmed.

Mr. Justice BELL and Mr. Justice MUSMANNO dissent.

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[1] See Act of 1858, P. L. 385; Act of 1885, P. L. 37; Act of 1919, P. L. 581.

[2] See Section 6-104; 6-106; 6-400(a); 8-200(3).

Findings and Verdict of the Court of Common Pleas of Philadelphia County, Pennsylvania

1. This is an action in mandamus brought by certain uniformed employees of the City of Philadelphia to compel the City to establish a 40-hour regular work week for all such personnel and to compel the City to pay overtime wages for all hours over 40 hours per week worked by such personnel since January 7, 1952.

2. On October 29, 1951, and January 2, 1952, City Council enacted ordinances which purported to establish a 40-hour regular work week for all City employees, commencing on January 1, 1952.

3. On January 7, 1952, the provisions of the Philadelphia Home Rule Charter became effective and a Civil Service Regulation was promulgated. This regulation provided that wages and hours of work of City employees should be the same as they had been on October 26, 1951.

4. The aforesaid regulation, known as Supplemental Emergency Regulation A, was proper and valid and superseded the Ordinances of October 29, 1951 and January 2, 1952.

5. Supplemental Emergency Regulation A was replaced by Section 4(a)(3), of Regulation XIX, effective January 1, 1953. This regulation was also valid.

6. There was no appropriation in the 1952 budget which was intended by Council to be, or which in fact became, available for the payment of overtime work of plaintiffs or those in the same class as plaintiffs.

7. Plaintiffs have failed to prove by the applicable standard of proof their right to relief which they seek in this action.

8. The defendants are entitled to a verdict in their favor.

THEREFORE, the plaintiffs' complaint is dismissed and the court enters a verdict in favor of the defendants.

By THE COURT:
/s/ DOTY, J.

October 28, 1964

Opinion and Judgment of the Court of Common Pleas of Philadelphia County, Pennsylvania

EN BANC 3/14/66

This matter is presently before the Court for consideration of plaintiffs' exceptions to the findings and verdict rendered by the trial judge sitting without a jury. After a careful consideration of the entire record, the briefs filed, oral argument presented and the applicable law, we are of the opinion that these exceptions must be dismissed.

The historical background out of which this case arises may be summarized as follows: An ordinance enacted by City Council of Philadelphia and approved by the then Mayor Bernard Samuel on October 29, 1951 (as amended on January 2, 1952) provided that effective January 1, 1952, the standard work week of the employees of the City of Philadelphia would be reduced from 48 hours to 40 hours; on January 7, 1952, when Mayor Joseph S. Clark assumed office, the Philadelphia Home Rule Charter, which had been approved by the electorate on May 17, 1951, went into effect; pursuant to the provisions of the Charter, Civil Service Supplemental Emergency Regulation A was immediately promulgated directing that wages and hours of work of City employees were to be the same as they had been on October 26, 1951, thereby purporting to restore the 48 hour standard work week; this emergency regulation was made permanent on January 1, 1953, by Regulation XIX.

In 1955 this suit in mandamus was instituted by plaintiffs, who are members of the Police Department of the City of Philadelphia, to compel the City to establish a 40-hour regular work week for policemen and park police and to compel the City to pay overtime wages for all hours in excess of forty hours per week worked by such personnel since January 7, 1952. The basis of the action is the contention that both Emergency Supplemental Regulation A and Regulation XIX are invalid and, hence, did not rescind the forty-hour work week imposed by the 1951 Ordinance.

Following trial the Court concluded: that both regulations are valid and effectively supersede the 1951 ordinance, that City Council had not included any appropriation in the 1952 budget overtime pay for plaintiffs or for other city employees in the same class as plaintiffs and the Court dismissed the complaint and entered a verdict for defendants.

Plaintiffs attack the validity of the emergency regulation and Regulation XIX on the grounds that: (1) they were not approved by the Administrative Board; (2) they were not advertised adequately to inform the public of their importance; (3) there was no emergency affecting public health and safety to justify promulgation of emergency Regulation A; and (4) the regulations are unconstitutional in that they are class legislation, which discriminates against policemen.

We are of the opinion that there is absolutely no substance to any of these contentions. With regard to the first contention, the record clearly reveals that the Administrative Board did in fact approve both regulations and that the action of the Board was taken with all of the pertinent facts before it. The record also reveals that there was proper and adequate advertising in regard to these regulations, which met the requirements of the charter.

With regard to the contention that there was no emergency affecting public health and safety to justify promulgation of the emergency regulation in question, the evidence presented at trial amply warrants the conclusion that such an emergency did exist. Had the forty-hour work week for all City employees remained in effect for any period of time beyond January 7, 1952, the attendant pay schedules would have quickly drained the City Treasury and jeopardized the normal and necessary services provided by the City to the public. There can be no doubt that these conditions constituted such a emergency as would justify the promulgation of the regulation in question.

Finally, the contention that the regulations are discriminatory against policemen and therefore unconstitutional in our view is utterly devoid of merit. We know of no law which would divest a municipality of its prerogative to

set hours and wages for employees according to the services they provide. A contrary holding would seriously hamper the City in maintaining propitious employment practices.

Our conclusions are fully supported by the decision in O'DONNELL v. PHILADELPHIA, 385 Pa. 189 (1956), which in our opinion squarely rules the instant matter. In O'DONNELL it was held that the same regulations here under consideration, namely, Emergency Supplemental Regulation A and Regulation XIX had effectively re-imposed a 48-hour work week on all City employees commencing January 7, 1952. The Supreme Court further concluded that since there had been no appropriation made by City Council for the year 1952 to make overtime payments, no recovery could be had for hours worked by City employees beyond the 40-hour week. We find nothing in the case at Bar by way of evidentiary fact or legal argument, which impels us to a different conclusion.

It is important to note also the 9-year lapse between the date of institution of suit and the date of trial. This lapse resulted from plaintiffs' failure to diligently prosecute the action. It is well settled in a long line of cases that it is a plaintiff's duty to prosecute his action with diligence. (See, e.g., ULAKOVIC v. METROPOLITAN LIFE INSURANCE COMPANY, 339 Pa. 571 (1940); ALKER v. PHILADELPHIA NATIONAL BANK, 372 Pa. 327 (1953). Plaintiffs' failure to move this case forward would so inflate the magnitude of any judgment to be rendered in their favor as to offer catastrophic financial consequences to the City of Philadelphia. Moreover, the administrative labors that would be involved in retracing the hours of work for each policeman since 1952 obviously would be ruinous to the City, if not totally insuperable.

Accordingly, plaintiffs' exceptions are dismissed and judgment for the defendants entered on the verdict.

By THE COURT:
/s/ SPORKIN, J.
/s/ GRIFFITHS, J.
/s/ DOTY, J.

Opinion of the Supreme Court of Pennsylvania

OPINION BY MR. JUSTICE ROBERTS, June 29, 1967:

This is an appeal from the judgment of the Court of Common Pleas No. 2 of Philadelphia County entered March 14, 1966 dismissing exceptions of plaintiffs and entering judgment for defendants on the verdict in an action of mandamus. Plaintiffs are certain policemen, crime investigation officers and retired policemen on their own behalf and on behalf of all police and park police similarly situated. Defendants are the City of Philadelphia, the mayor and other city officials. The action from which this appeal arises was instituted in 1955 to compel the city to pay plaintiffs at overtime rates for working more than a five-day, 40-hour work week since January 7, 1952 and to restore a five-day, 40-hour work week for all city policemen and park police.[1]

Prior to October 29, 1951 Philadelphia police were on a six-day, 48-hour work week schedule. On that day an ordinance was adopted, effective January 1, 1952, establishing a five-day work week for city employees, and authorizing the mayor to execute an agreement with the American Federation of State, County and Municipal Employees, District Council No. 33. The agreement authorized provided that the regular work week for the union's employees should consist of a five-day, 40-hour work week, that overtime beyond eight hours in any day or beyond five days any week should be paid for at the rate of time and one-half and that work performed on Sunday should be paid for at double time. On January 2, 1952, the ordinance of October 29, 1951 was amended to provide that on and after January 1, 1952 the standard work week of all city employees, including police, be in accordance with the 40-hour plan described above. Thus, effective January 1, 1952, police and park

[1] In a previous appeal in this case, *Baxter v. Philadelphia*, 385 Pa. 424, 123 A. 2d 634 (1956), this Court sustained the judgment of the court below denying plaintiffs' motion for judgment on the pleadings.

police of the city were placed on a work week schedule of 40 hours.

On January 7, 1952, Philadelphia's Home Rule Charter, which had been adopted by the electorate in the spring of 1951, came into effect and a new city administration was inducted into office. On that same day, the new Civil Service Commission, appointed under the charter, promulgated Supplemental Emergency Civil Service Regulation A. This regulation provided that effective January 7, 1952 the hours of work, the rates of pay and determination of compensation of all city employees should be as legally established on October 26, 1951. Thus, following adoption of this regulation, policemen and park police were, in fact, returned to a six-day, 48-hour work week. Finally, it must be noted that effective January 1, 1953 the Civil Service Commission adopted another regulation which continued in effect the six-day, 48-hour week for police and park police.[2]

The instant action was instituted by plaintiffs to compel a restoration of the 40-hour week and to obtain payment pursuant to the provisions of the ordinance of January 2, 1952 for hours worked by plaintiffs in excess of 40 per week between January 7, 1952 and the present time.[3] In support of their claim plaintiffs urged in the court below and in their appeal that the regulations returning police to a six-day, 48-hour week were invalid: (1) because they were not ber 29, 1951 and an agreement between the city and their adopted in compliance with the procedural requirements of the charter; (2) because they constituted an ineffective attempt to repeal the ordinances of October 29, 1951 and January 2, 1952; (3) because they violate Pa. Const. Art. III, §7 by granting special privileges to city employees (i.e., unionized employees of the former Public Works Depart-

[2] Following appropriations therefor by City Council, the regular work week of Philadelphia's police was reduced in 1957 to 44 hours and in 1960 to 42 hours.

[3] The total amount which would be required to compensate plaintiffs in accordance with the ordinance of January 2, 1952 is over $50,000,000.

ment granted a 40-hour week under the ordinance of October 29, 1951 and an agreement between the city and their union) other than police; (4) because they violate the equal protection and due process guarantees of the Constitution of the United States; (5) because they violate constitutional guarantees of the obligation of contracts.

In findings of fact affirmed by the court en banc, the trial judge concluded that Supplemental Emergency Civil Service Regulation A and the subsequent regulation of January 1, 1953 validly superseded the ordinances of October 29, 1951 and January 2, 1952 and that there was no appropriation by City Council in the 1952 budget which "was intended by Council to be or which in fact became, available for the payment of overtime work of plaintiffs or those in the same class as plaintiffs." The court en banc, in its opinion affirming the findings of fact of the trial judge, went on to conclude in its opinion that appellant's constitutional claims were completely devoid of merit.

On this appeal, in addition to reasserting claims mentioned above, plaintiffs complain that the court below erred in: (1) admitting certain evidence tending to show the procedural validity of the adoption of the civil service regulations; (2) admitting the testimony of the Deputy Finance Director and Personnel Director as to the additional funds it would cost the city if police were put on a 40-hour, rather than a 48-hour week; (3) admitting evidence of the mayor's budget requests for the purpose of showing that the lump sum appropriations by council were not intended to cover the additional cost of reducing hours of work for police; (4) limiting plaintiffs' counsel to thirty minutes of oral argument plus five minutes of rebuttal before the court en banc.

At the outset it should be noted that plaintiff's assertion that the civil service regulations here involved constituted an invalid attempt to repeal prior ordinances of City Council is groundless. In *Ebald v. Philadelphia*, 7 Pa. D. & C. 2d 179 (C.P. Phila. 1956), aff'd per curiam on the opinion of the court below, 387 Pa. 407, 128 A. 2d 352 (1957), it was

recognized that the Philadelphia Home Rule Charter vests in the administration sole responsibility for prescribing civil service regulations, even to the extent of superseding inconsistent statutes of the General Assembly. Indeed, in *Ebald* the court observed: "Since it is evident that the framers of the Home Rule Charter intended matters affecting personnel administration to be governed exclusively by civil service regulations, a supporting ordinance of city council not only becomes unnecessary but would be invalid as in derogation of the powers vested by the charter in the Personnel Director and the Civil Service Commission. . . ." (Citation omitted.) 7 Pa. D. & C. 2d at 183-84.[4]

It should also be noted at the outset that plaintiffs are incorrect in their belief that the city had the burden of proving the validity of the civil service regulations. This view plaintiffs base on the contention that the regulations constituted an implied repealer of the ordinances of October 29, 1951 and January 2, 1952 and the doctrine that implied repeals are an affirmative defense. Because of our view that the Charter explicitly took from City Council the power to legislate with regard to the civil service matters covered by the regulations here in question, we do not consider that the regulations may be properly characterized as an implied repealer. Hence, we believe the normal presumption of validity attached to the regulations[5] and that plaintiffs therefore had the burden of showing their invalidity.

Plaintiffs' claim that Supplemental Emergency Civil Service Regulation A of January 7, 1952 and the regulations of January 1, 1953 were not adopted in compliance with the procedural requirements of the Charter is based on the

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[4] Cf. *O'Donnell v. Philadelphia*, 385 Pa. 189, 192, 122 A. 2d 690, 691 (1956); *American Fed'n of State, County and Municipal Employees, Dist. Council No. 33 v. Philadelphia*, 83 Pa. D. & C. 537 (C. P. Phila. 1952).

[5] E.g., *Review Committee, Venus VII v. Wiley*, 275 F. 2d 264, 272 (8th Cir.), cert. denied, 363 U. S. 827, 80 S. Ct. 1597 (1960); *People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 201 N. E. 2d 390, 393 (1964).

following alleged defects: (1) the regulations were not approved by the Administrative Board as required by §7-400 of the charter; (2) there was no emergency "affecting the public health or safety" within the meaning of §8-407 of the charter justifying the action of the mayor in making the regulations immediately effective instead of deferring their effectiveness for the thirty day period required by §8-407; (3) that the regulations were void for failure adequately to advertise them. We consider first plaintiffs' attacks on the procedural regularity of the regulation of January 7, 1952 since, if that regulation were valid, the validity of the later regulation, which imposed the same hours of work, is immaterial to the outcome of this litigation, because the earlier regulation would merely have remained in effect.[6]

Plaintiffs' contention that the regulation of January 7, 1952 was not approved by the Administrative Board rests solely on the ground that the city did not present the best evidence of the approval. From the record it appears that the city called as a witness the present Secretary of the Administrative Board. In the custody of the secretary was the official minute book of the board. The secretary testified to the approval of the regulation from the contents of the minute book. On cross-examination plaintiffs' attorney elicited

[6] In this litigation plaintiffs have earnestly attacked the validity of two other regulations promulgated by the Civil Service Commission at the beginning of 1952. These regulations are known as Regulation XIX and Regulation XXVII, §2. It is completely unnecessary for us to consider either of these attacks. Regulation XIX merely directs the Personnel Director to perform duties prescribed by Article VII of the Philadelphia Home Rule Charter. Hence, whether or not Regulation XIX is valid, the Personnel Director had a valid basis in law for the performance of the duties imposed by the regulation. Regulation XXVII, §2, which purported to place in effect the work and pay plan established by the ordinance of January 2, 1952 and which was specifically superseded by Supplementary Emergency Civil Service Regulation A, is totally irrelevant to the injury complained of by the plaintiffs in this litigation and hence the validity of Regulation XXVII, §2 need not be considered by us.

from the secretary the information that all the minutes in the book including the approval of the regulation were in mimeographed form. Because of their mimeographed form, plaintiffs' attorney urges, in effect, that there must have been "an original" and that failure of the city to produce this original or to satisfactorily explain nonproduction made the proffered document inadmissible.

There are two answers to plaintiffs' assertion with respect to the best evidence rule. The first is that the mere fact that mimeographs are made from a stencil does not indicate whether that stencil or a previous draft (if it existed at all) were approved by the Administrative Board as the minutes. It is just as likely that the minutes only became official in their mimeographed form. In other words, the fact that the contents of the official minute book are in mimeographed form fails to indicate with any certainty that better evidence, i.e., "an original" exists. This Court has maintained for well over a century that the failure of a document to indicate the existence of better evidence prevents that document's exclusion from a judicial proceeding under the best evidence rule. *Western Union Tel. Co. v. Stevenson*, 128 Pa. 442, 454, 18 Atl. 441, 442 (1889); *Cutbush v. Gilbert*, 4 S. & R. 550, 555 (Pa. 1818). The second answer to plaintiffs' argument is that our law specifically makes admissible the official minutes of a political subdivision of the Commonwealth, when as here, they are presented to the court by their official custodian, *Roland v. Reading School Dist.*, 161 Pa. 102, 28 Atl. 995 (1894); see Act of September 26, 1951, P. L. 1458, §1, as amended, Act of May 15, 1963, P. L. 35, §1, 28 P.S. §141 (Supp. 1967).

The emergency "affecting the public health or safety" upon which Mayor Clark relied in declaring the regulation of January 7, 1952 effective immediately resulted,[7]

[7] In their brief on appeal, plaintiffs complain that the court below erred in permitting the city to introduce into evidence a photostatic copy rather than the original of the mayor's declaration of the emergency. This claim is foreclosed by plaintiffs' specific and explicit waiver of this objection in the court below. Record at 481a.

in the city's view, from the failure of council to appropriate the funds required to maintain under the 40-hour work week plan the level of police coverage existing prior to January 1, 1952. This was because the outgoing City Council, which had put into effect the 40-hour plan by the ordinances of October 29, 1951 and January 2, 1952, had failed to appropriate for the ensuing fiscal year sufficient funds to maintain the level of police coverage.[8] Thus the city contends the mayor was justified in declaring the emergency because of the sudden twenty percent drop in coverage that a reduction from a 48 to a 40-hour work week, without additional appropriations, would have entailed.

Plaintiffs' reply to the city's justification of the declaration of the emergency rests essentially on the testimony of Mr. Samuel Rosenberg and of certain policemen. In his capacity as Director of Public Safety, Mr. Rosenberg had supervision over the Philadelphia police for the four years ending January 7, 1952. Mr. Rosenberg testified, and it was stipulated by opposing counsel that certain policemen would testify to the same effect, that during the one week beginning January 1, 1952, when the police work week was in fact reduced from 48 to 40 hours, no problems were experienced and no emergency affecting the public health or safety arose. Plaintiffs seek to draw from this testimony and from the absence in the record of testimony on

[8] During the course of this litigation plaintiffs have strenuously asserted that the funds appropriated by City Council were sufficient to cover the cost of the reduction of the police work week from the 48 to the 40-hour plan. All but one of the plaintiff's arguments in this respect were explicitly rejected by this Court in *O'Donnell v. Philadelphia*, 385 Pa. 189, 193-95, 122 A. 2d 690, 692-93 (1956), a case involving virtually the precise question involved in the instant litigation. Plaintiff's one argument not covered by *O'Donnell* that the funds were available in unexpended appropriations for personal services in the police department is refuted by the simple arithmetical fact that in no year mentioned did the unexpended funds even approach 50% of the difference between what would have been required by the 40-hour work plan and the amount expended under the existing pay plan.

behalf of the city from any police source a conclusive refutation of the city's position. Indeed, plaintiffs assert that the court below was required to accept the conclusion of their witnesses because the city's testimony from the Personnel Director and Deputy Finance Director to the effect that the reduction in work would have reduced coverage was incompetent because not from witnesses qualified to express an opinion on matters involving police administration.

In considering the plaintiffs' argument with respect to the declaration of an emergency we have been guided by certain principles. To begin with we believe that §8-407 of the Charter, by vesting the mayor with the power to declare an emergency, imposes a heavy burden on any party who wishes to attack the validity of this declaration. We also believe the validity of the declaration should be controlled by the situation as it reasonably appeared to the mayor on January 7, 1952, rather than as it presently appears with all the advantages which hind-sight may provide. Similarly, we believe that reliance by the mayor on the appraisal of the situation by financial and personnel experts was perfectly reasonable and hence we reject plaintiffs' claim that their testimony at trial should have been excluded as incompetent. After all, the mayor might reasonably have declined to rely on the view of the police themselves, given the extent of their material interest in the matter. Finally, it must be borne in mind that the trial judge, affirmed by the court en banc below, chose to accept the city's rather than the plaintiffs' contention with regard to the emergency. Such a finding, insofar as it involves a question of fact, has the effect of a jury's verdict and will not be disturbed on appeal if based on sufficient evidence, e.g., Schofield v. Crossman, 420 Pa. 196, 216 A. 2d 455 (1966).

Against the background of these principles, we think that there can be little doubt of the propriety of the declaration of the emergency. As the able brief of the city states,

it is a matter of simple arithmetic that the shift from a 48 to a 40-hour week without a corresponding appropriation would have reduced the number of police manpower hours by twenty percent. This, in turn, we believe, the new administration could, in the circumstances, reasonably have concluded would result in a reduction of police coverage of corresponding magnitude. It takes little imagination to suggest that in a metropolis like Philadelphia such a sudden reduction in coverage posed dangers to the public safety. And the testimony of police, even if believed, that no problems were experienced during the single week at the beginning of 1952 when the police work week was reduced from 48 to 40 hours does not refute this suggestion. For since part of the value of police coverage lies in deterrence, it may well be that, although the initial reduction failed to have an immediate adverse effect on public safety, a reduction persisted in for weeks or months might have become apparent to criminal elements and hence invited a dangerous increase in their activity.

Plaintiffs' contention that the regulation of January 7, 1952 was invalid because inadequately advertised need not detain us long. Section 8-407(b) of the charter requires only that: "The Department of Records shall give public notice of such filing by advertising in the three daily newspapers of the City having the largest paid circulation the fact that regulations relating to a particular subject have been filed with it, and that any person affected thereby may request a hearing."

The advertisement inserted by the city in the three daily newspapers of Philadelphia having the largest paid circulation was as follows: "Notice is hereby given, pursuant to Section 8-407(b) of the Philadelphia Home Rule Charter adopted by the Electors April 17, 1951, that on January 7, 1952, Philadelphia Emergency Civil Service Regulations and Supplements A, B, C and D were filed with the Department of Records, Room 184, City Hall, where they will be available for public inspection for thirty days.

Any person affected thereby may request a hearing by presenting to the Department of Records a written request therefor. By reason of the emergency affecting the public health and safety, these Emergency Regulations and Supplements thereto became effective January 7, 1952, by Order of the Mayor, Joseph S. Clark, Jr."

We believe this advertisement was adequate to put public employees on inquiry that matters affecting their conditions of employment had been touched upon by the regulations. Plaintiffs fail to cite any authority which suggests that more was required. Moreover, it is difficult to believe that Philadelphia police were not aware of the effect of the regulation of January 7, 1952 since the work week of all was immediately affected.

The lack of merit in plaintiffs' attack on the regulation of January 7, 1952 under equal protection and due process guarantees is suggested by the fact that their only citation of authority is extremely general language from a case involving an inter-racial cohabitation statute.[9] Essentially plaintiffs' position is that the regulation requiring uniformed employees, including police, to work longer than certain other employees was prima facie discriminatory and that the city failed to meet its burden of presenting a justification for the differences imposed. Plaintiffs are, of course, incorrect as to the locus of the burden; as pointed out above,[10] administrative regulations are presumed valid and the burden is upon the party who maintains otherwise. Moreover, we are convinced that the peculiar sensitivity of the public interests protected by police, especially in the circumstances present in the instant case, justify such differences as existed between treatment by the city of its police and other employees.[11] Indeed, we should be very

[9] *McLaughlin v. Florida*, 379 U.S. 184, 85 S. Ct. 283 (1964).

[10] See note 5 supra and accompanying text.

[11] Cf. *Iben v. Monaca Borough*, 158 Pa. Superior Ct. 46, 43 A. 2d 425 (1945) which suggests that differences between the terms of employment of uniformed and other employees is not constitutionally invalid discrimination.

reluctant to invalidate any measures through which government varies the wages and working conditions of public employees according to the functions they perform. Government must have broad discretion in adjusting incentives for public employment if it is to compete successfully in the labor market to provide adequately and economically services essential to the public weal. It is not difficult to envision the disruption and disservice which would result to the public welfare if the courts were to substitute their relatively uninformed judgment for the sophisticated expertise required in this area.

The reasons which defeat plaintiffs' claim under equal protection and due process guarantees serve equally to refute their claim under Article III, §7 of the Constitution of Pennsylvania.[12] *Schultz v. Philadelphia*, 385 Pa. 79, 122 A. 2d 279 (1956), relied upon by plaintiffs, as well as *Clark v. Meade*, 377 Pa. 150; 104 A. 2d 465 (1954), present situations distinguishable from the instant case. The legislation and Charter amendments struck down under Pa. Const. Art. III, §7 in *Schultz* and *Clark* sought to exempt the office and clerical personnel of some, but not all, former county offices from civil service requirements. It is apparent that the difference in function between office and clerical personnel of one office and another is far less significant than that between police and other municipal employees and thus that *Schultz* and *Clark* do not control the instant situation.

Plaintiffs' last constitutional claim is that the regulations requiring them to return to the 48-hour work week were an impairment of contractual rights and deprived them of vested rights. The authorities reviewed in *Kelly v. Jones*, 419 Pa. 305; 214 A. 2d 345 (1965) completely dispose of this contention.

Finally we consider plaintiffs' claim that they were unfairly limited to thirty minutes of oral argument and five minutes of rebuttal argument before the court below.

---

[12] See also *Iben v. Monaca Borough*, note 11 supra.

A matter such as the length of argument is, of course, almost entirely within the discretion of trial courts, see *Commonwealth v. Buccieri*, 153 Pa. 535, 551, 26 Atl. 228, 234 (1893). Moreover, where, as here, no jury was present and plaintiffs' counsel could have presented to the court by way of briefs any contentions he was unable to develop fully in oral argument, we believe that plaintiffs were not prejudiced by the limitation of time on their oral argument.

Judgment affirmed.

Mr. Justice Cohen took no part in the consideration or decision of this case.

Appendix B

STATUTES, ETC., INVOLVED

Philadelphia Home Rule Charter

Section 1-100. *The City's Powers Defined.* Pursuant to Section 1 of Article XV of the Constitution and the Act of the General Assembly, approved April 21, 1949, P. L. 665, of the Commonwealth of Pennsylvania, the City of Philadelphia (hereafter in this charter called "the City") shall have and may exercise all powers and authority of local self-government and shall have complete powers of legislation and administration in relation to its municipal functions, including any additional powers and authority which may hereafter be granted to it. The City shall have the power to enact ordinances and to make rules and regulations necessary and proper for carrying into execution its powers; and such ordinances, rules and regulations may be made enforceable by the imposition of fines, forfeitures and penalties not exceeding three hundred dollars and by imprisonment for a period not exceeding ninety days or by such greater fines, forfeitures and penalties and periods of imprisonment as the General Assembly of the Commonwealth of Pennsylvania may from time to time authorize.

* * * * *

Section 1-101. *Legislative Power.* The legislative power of the City, including any such power which may hereafter be conferred on the City by amendment of the Constitution or by the laws of the Commonwealth of Pennsylvania, shall be exclusively vested in and exercised by a Council, subject only to the provisions of this charter. The Council shall be elected, shall organize and shall function as provided in this charter.

Section 3-702. *Employment and Compensation of Bureau Chiefs and Other Employees.*

* * * * * *

(3) Notwithstanding any other provisions of this chapter, the compensation of persons presently employed by the City shall be according to the presently existing classification and pay scale until civil service regulations are adopted as provided in this charter after which all persons subject to the civil service regulations shall be employed and compensated in accordance with such regulations.

* * * * * *

Section 7-400. *Preparation and Adoption.* The civil service regulations shall be prepared by the Personnel Director. Regulations pertaining to the position classification plan, pay plan, hours of work, holidays and annual vacation and sick leave shall be submitted by the Personnel Director for approval to the Civil Service Commission and Administrative Board. All other civil service regulations shall be submitted by the Personnel Director for approval to the Civil Service Commission only. After the requisite approvals shall have been obtained, the regulations shall be filed by the Personnel Director with the Department of Records, where they shall be available for public inspection for thirty days, and public notice of such filing shall be given as in the case of other regulations.

If any person affected by the proposed regulations or any citizen shall present to the Department of Records a written request therefor, he shall be afforded a public hearing before the Commission. The Commission may after a hearing re-affirm its approval or direct that the regulations be changed but any modification of a regulation which required initially the approval of the Administrative Board shall be submitted to it for approval. The subsequent procedure shall be the same as in the case of other regulations.

* * * * * *

Section 7-401. *Contents.* The regulations shall provide for:

(a) The preparation, maintenance and revision of a position classification plan for all positions in the civil service, based upon similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class;

(b) A pay plan for all employees in the civil service. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed;

* * * * *

(r) Hours of work, holidays, attendance regulations, and special leaves of absence in the various classes of positions in the civil service;

* * * * *

Section 8-407. *Regulations.* Except as otherwise specifically provided in this charter, every department, board and commission is hereby empowered to make such reasonable regulations as may be necessary and appropriate in the exercise of its powers and the performance of its duties under this charter or under any statute or ordinance. Except as otherwise provided in this charter, in the adoption of regulations, the following procedure shall apply:

(a) The department, board or commission promulgating the regulations shall first submit them for approval to the Law Department and upon receiving such approval file them with the Department of Records where they shall be available for public inspection for thirty days;

(b) The Department of Records shall give public notice of such filing by advertising in the three daily newspapers of the City having the largest paid circulation the fact that regulations relating to a particular subject have been filed with it, and that any person affected thereby may request a hearing;

(c) If any person affected shall present to the Department of Records a written request therefor, he shall be afforded a public hearing before the department, board or commission promulgating the regulations and the City Solicitor. A report of the hearing reaffirming the regulations or modifying them with the approval of the Law Department shall be filed by the department, board or commission with the Department of Records.

The regulations shall become effective at midnight of the thirtieth day after their filing when no hearing has been requested and at midnight of the tenth day after a report has been filed when a hearing was requested and held.

All regulations shall be published and made available for distribution.

Amendments to regulations shall be adopted under the same procedure as the regulations which they amend.

The requirements of this section may be suspended by the Mayor in writing and temporary regulations promulgated in emergencies affecting the public health or safety but any regulations so put into force shall not remain effective unless the procedures otherwise required by this section are complied with forthwith.

* * * * *

Section A-110. *Continuation of Existing Statutes and Ordinances.* The provisions of this charter so far as they are the same as those of existing statutes or ordinances shall be construed as a continuation of such statutes or ordinances and not as new enactments.

EMERGENCY REGULATION XIX

Section 4

(a) Normal work weeks—the basic work weeks for full time employees in the Civil Service are as follows:

(1) General

For all employees, except as provided below, the regular work week shall be 40 hours, consisting of 5 working days, Monday to Friday, inclusive, of 8 hours each.

(2) Clerical and Office

For clerical and office employees the work week shall be not less than 37½ hours nor more than 40 hours and the work day shall not be more than 8 hours as fixed pursuant to sub-paragraph (b) below.

(3) Police and Firemen

For all uniformed and investigatory personnel of the Fairmount Park Commission, police and fire departments, the regular work week shall be 48 hours, consisting of 6 working days of 8 hours each.

(4) Shift employees

The shift employees' work week shall consist of 40 hours, 5 days, 8 hours each, Monday to Sunday, inclusive.

(5) Exceptions

Because of the nature of certain types or classes of work may require deviation from the normal work weeks, including the hours worked per day and/or the numbers of days worked per week, application may be made to the Civil Service Commission for exceptions.

(b) Schedule of Work

The appropriate authority of each office, department, board, or commission shall, within 1 month of the adop-

tion of this regulation, submit to the Personnel Director, in triplicate, for approval, a schedule of normal working hours for each organizational unit. Such schedule shall specify regular weekly hours and/or days of work for each class of employees with exceptions noted, if any. After approval by the Civil Service Commission and the Administrative Board, such schedules remain in effect until further revision has been similarly approved.

Section 5—Holidays

1. Employees who do not work at all on any of the said holidays shall receive their normal pay for the number of hours they would normally have worked on the particular day involved.

2. Any employee required to work on any of the above enumerated holidays, shall, in addition to his normal pay for the day, receive an additional day's pay at his regular rate of pay for the holiday work and double time for all hours worked over 8 hours on that day.

3. Provisions for holiday pay shall not be applicable to uniformed and investigatory personnel of the Police and Fire Departments and Fairmount Park Commission.

* * * * *

REGULATION VI

Section 9. *Overtime.*

For the purposes of computing overtime pay the following provisions shall prevail for employees in the following categories:

(a) *General*—For all employees, except as provided below, time worked in excess of eight hours in any work day and all hours worked on the sixth day in the employee's work week, shall be paid for at the rate of one and one-half times the regular rate of pay. All hours worked on the seventh day in the employee's work week shall be paid for at the rate of two times the regular rate of pay.

(b) *Clerical and Office*—For clerical and office employees whose normal work week is 40 hours, performed during five working days, the above provisions as to payment of overtime rates shall apply. For those clerical and office employees whose normal work week is less than 40 hours but is equal to or more than 37½ hours, a total of 40 hours of actual attendance on duty must be completed before overtime rate at one and one-half times the regular rate of pay shall apply, provided however, that such 40 hours shall not include time worked for which daily or other overtime has been earned. Time worked in excess of eight hours in any work day shall be paid for at the rate of one and one-half times the regular rate of pay, and all hours worked on the seventh day in the employee's work week shall be paid for at the rate of two times the regular rate of pay.

(c) *Police and Fire*—Overtime rates shall not apply to uniformed and investigatory personnel in the Fairmount Park Commission, police and fire departments.

(d) *Shift Employees*—Employees working in shift operations are defined as being any employee or group of employees engaged in an operation for which there is regularly scheduled employment on Saturdays or Sundays, in which employment said employees participate on a fixed or rotating basis. The shift employee work week shall consist of forty (40) hours, five (5) days, eight (8) hours each, Monday to Sunday inclusive.

Overtime is to be compensated for on the following basis:

(1) Any work performed by an employee after completing eight (8) hours of work in any work shift at his regular rate of pay shall be considered overtime. The employee shall be paid one and one-half (1½) times his regular rate of pay for such overtime.

(2) Any work performed by an employee on his or her first regularly scheduled day off shall be overtime.

The employee shall be paid one and one-half (1½) times his regular rate of pay for such overtime.

(8) Any work performed by an employee on his or her second regularly scheduled day off, shall be considered overtime. The employee shall be paid two (2) times his regular rate of pay for such overtime.

* * * * *

Effective January 1, 1953, CIVIL SERVICE REGULATION XIX—HOURS OF WORK, HOLIDAYS, VACATION AND SICK LEAVE, is hereby amended to read as follows:

REGULATION XIX

HOURS OF WORK, HOLIDAYS, VACATION AND SICK LEAVE

Section 4. *Hours of Work.*

(a) *Normal work weeks*—The basic work weeks for full-time employees in the civil service are as follows:

1. *General.* For all employees, except as provided below, the regular work week shall be 40 hours, consisting of five working days, Monday to Friday inclusive, of eight hours each.

2. *Clerical and Office.* For clerical and office employees the work week shall be not less than 37½ hours nor more than forty hours, and the work day shall be not more than 8 hours as fixed pursuant to sub-paragraph (b) below.

3. *Police and Fire.* For all uniformed and investigatory personnel of the Fairmount Park Commission, police and fire departments the regular work week shall be 48 hours, consisting of six working days of eight hours each.

4. *Exceptions.* Because the nature of certain types or classes of work may require deviations from the nor-

mal work weeks, including the hours worked per day and/or number of days worked per week, application may be made to the Civil Service Commission for exceptions.

(b) *Schedules of Work*—The appropriate authority of each Office, Department, Board or Commission shall, within one month of the adoption of this regulation, submit to the Personnel Director in triplicate for approval a schedule of normal working hours for each organizational unit. Such schedules shall specify regular weekly hours and/or days of work for each class of employee with exceptions noted, if any. After approval by the Civil Service Commission and the Administrative Board such schedules shall remain in effect until further revision has been similarly approved.

Section 5. *Holidays.*

The following shall be recognized holidays: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday, Memorial Day, Flag Day, Independence Day, Labor Day, Columbus Day, November Election Day, Armistice Day, Thanksgiving Day and Christmas Day.

(a) *Holiday Pay.*

1. Employees who do not work at all on any of said holidays shall receive their normal pay for the number of hours they would normally have worked on the particular day involved.

2. Any employee required to work on any of the above enumerated holidays shall, in addition to his normal pay for the day, receive an additional day's pay at his regular rate of pay for the holiday work, and double time for all hours worked over eight (8) hours on that day.

3. Provisions for holiday pay shall not be applicable to the professional employees of the Department of Recreation.

(b) *1953 Saturday Holidays*. During 1953 when a holiday falls on a Saturday for an employee not scheduled to work on Saturday, it shall be added to the employee's vacation, provided that the individual department head may at his discretion, schedule the extra day's vacation at some time other than the employee's regular vacation. This provision shall only apply for the year 1953 and shall in no wise be regarded as establishing a precedent for future years.

Section 6. *Vacations.*

(a) All employees with less than one year's employment with the City shall receive five-sixths of one day's vacation with pay for each month of service; all employees with one or more year's employment and less than ten years' employment with the City shall receive two weeks' vacation with pay; all employees with ten or more years' employment with the City shall receive three weeks' vacation with pay.

(b) *Holiday Falling Within Vacation Period*—In the event that one of the enumerated holidays above set forth falls within the vacation period, the employee shall receive the pay for the holiday in addition to such employee's vacation grant.

Ordinances of City of Philadelphia

AN ORDINANCE

Establishing a Standard Work Week for Employees of the City of Philadelphia

Section 1. *The Council of the City of Philadelphia ordains*, That on and after January 1, 1952, the standard work week of the employees of the City of Philadelphia and of the departments, bureaus, boards, commissions and other agencies thereof shall consist of five work days.

Sect. 2. The heads of the various departments, bureaus, boards, commissions and other agencies of the City are authorized and directed to prepare and place into effect work schedules for their respective units in accordance with the provisions of Section 1 of this ordinance.

Sect. 3. The Mayor is hereby authorized and directed to execute and deliver an agreement between the City of Philadelphia and the American Federation of State, County and Municipal Employees, District Council No. 33, Philadelphia and Vicinity, further amending an agreement dated December 7, 1944, between the said parties, which amendatory agreement shall provide that the provisions under "Hours of Work" shall be amended to read as follows:

"Hours of Work

1. The regular work week for the employees shall consist of a regular work week of forty (40) hours consisting of five (5) days of eight (8) hours each, Monday to Friday, inclusive.

2. If it becomes necessary, because of insufficient funds in the applicable appropriation for the payment of employees in any of the bureaus affected by this Agreement at any time during the year, and in order to provide insofar as practicable a forty (40) hour work week for each of the remaining weeks in the current year, a sufficient number of employees may be laid off on the basis of seniority and ability, provided that where ability in the opinion of the Employer is relatively equal, then seniority shall prevail, subject to review under the provisions of the section on 'Grievance Procedure' herein. The business agent of the union involved shall be advised of the intended lay-off and given the opportunity of review by the Employer.

3. Overtime for all employees shall be compensated for at the rate of time and one-half times the regular rate of pay and shall commence immediately upon the completion

of eight (8) hours of work on any work day, or five (5) days in any work week, except for work performed on Sunday which shall be double time."

AN ORDINANCE

To amend Section 1 of an ordinance approved October 29, 1951, entitled "An Ordinance establishing a standard work week for employees of the City of Philadelphia" by changing the composition of the standard work week.

Section 1. *The Council of the City of Philadelphia ordains*, That Section 1 of the ordinance approved October 29, 1951, entitled "An Ordinance establishing a standard work week for employees of the City of Philadelphia" is amended to read as follows:

"That on and after January 1, 1952, the standard work week of the employees of the City of Philadelphia and of the departments, bureaus, boards, commissions and other agencies thereof shall consist of forty hours of work."

Pennsylvania Constitution

ARTICLE III
LEGISLATION

* * * * *

Special and Local Legislation Limited

Section 7. The General Assembly shall not pass any local or special law

Authorizing the creation, extension or impairing of liens:

Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:

Changing the names of persons or places:

Changing the venue in civil or criminal cases:

Authorizing the laying out, opening, altering or maintaining, roads, highways, streets or alleys:

Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State:

Vacating roads, town plats, streets or alleys:

Relating to cemeteries, grave yards, or public grounds not of the State:

Authorizing the adoption or legitimation of children:

Locating or changing county seats, erecting new counties or changing county lines:

Incorporating cities, towns or villages, or changing their charters:

For the opening and conducting of elections, or fixing or changing the place of voting:

Granting divorces:

Erecting new townships or boroughs, changing township lines, borough limits or school districts:

Creating offices, or prescribing the powers and duties of officers in counties, cities, boroughs, townships, election or school districts:

Changing the law of descent or succession:

Regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate:

Regulating the fees, or extending the powers and duties of aldermen, justices of the peace, magistrates or constables:

Regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes:

Fixing the rate of interest:

Affecting the estates of minors or persons under disability, except after due notice to all parties in interest, to be recited in the special enactment:

Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:

Exempting property from taxation:

Regulating labor, trade, mining or manufacturing:

Creating corporations, or amending, renewing or extending the charters thereof:

Granting to any corporation, association or individual any special or exclusive privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track:

Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed:

Nor shall any law be passed granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the courts have jurisdiction to grant the same or give the relief asked for.

Constitution of the United States

ARTICLE I.

* * * * *

Limitation of the Powers of the Several States

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 27 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 858.

ALBERT W. BAXTER, JAMES LOUGHRAN, WILLIAM COURTNEY, HARRY E. POVEY, SALVATORE A. MARIORANA, FRANCIS E. KNOLL, MAURICE J. O'LEARY, EDWARD J. O'KEEFE, JAMES MALONEY, FRANKLIN P. FRY, HERMAN ALEXANDER, JOHN P. COAN, WILLIAM ANSON, EDGAR WATIS, FRANK C. BARONE, HOWARD E. MILLAR and RALPH COLABERADINO,

Appellants,

v.

CITY OF PHILADELPHIA, JOSEPH S. CLARK, JR., VERNON D. NORTHROP, DONALD G. WAGNER, GEORGE DILAURO, RICHARD J. McCONNELL, SIDNEY B. DEXTER, LEON I. MESIROV, REV. E. LUTHER CUNNINGHAM and THOMAS J. GIBBONS,

Appellees.

On Appeal from the Supreme Court of Pennsylvania.

Motion to Dismiss

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Assistant City Solicitor,
MATTHEW W. BULLOCK, JR.,
Second Deputy City Solicitor,
LEVY ANDERSON,
First Deputy City Solicitor,
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IN THE

SUPREME COURT OF THE UNITED STATES

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Appellants,

v.

CITY OF PHILADELPHIA, JOSEPH S. CLARK, JR., VERNON D. NORTHROP, DONALD G. WAGNER, GEORGE DILAURO, RICHARD J. MCCONNELL, SIDNEY B. DEXTER, LEON I. MESIROV, REV. E. LUTHER CUNNINGHAM and THOMAS J. GIBBONS,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

MOTION TO DISMISS.

In accordance with Rule 16 of your Honorable Court, Appellee City of Philadelphia moves to dismiss the appeal in this case on the grounds that the appeal does not present

substantial federal questions, that one of the issues raised in Appellants' Jurisdictional Statement was not presented to the State Courts nor expressly passed upon, that the federal questions sought to be reversed were not timely raised, and that the judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of Pennsylvania entered on June 29, 1967 affirming the judgment of the Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania which had dismissed the exceptions of the Plaintiffs [Appellants herein] and entered judgment for the Defendants [Appellees herein] in an action of Mandamus.

This action was brought in 1955 by certain policemen, crime investigation officers and retired policemen on their own behalf and on behalf of all policemen and park police of the City of Philadelphia against the City of Philadelphia, the Mayor and other City officials to compel the City to pay them at overtime rates for working a regular 48-hour work week since January 7, 1952, and to restore a 40-hour regular work week for all City policemen and park police.

This case had its genesis in the adoption of the Home Rule Charter of the City of Philadelphia by the electorate on April 17, 1951 effective January 7, 1952. Prior to October 29, 1951 policemen, park police and firemen of the City of Philadelphia were on a regular 48-hour work week schedule. On that date the then Mayor of the City, Bernard Samuel, approved an ordinance, effective January 1, 1952, establishing a standard work week for City employees of five work days, and authorizing the Mayor to execute an agreement with the American Federation of State, County and Municipal Employees, District Council #33, that the regular work week for employees should consist of 40 hours

of five days of 8 hours each, Monday to Friday, inclusive, and that overtime beyond 8 hours in any day or beyond five days in any week should be paid at the rate of time and one-half; and work performed on Sunday should be paid for at double time.

On January 2, 1952 Mayor Samuel approved an ordinance of City Council amending the Ordinance of October 29, 1951 by providing that on and after January 1, 1952 the standard work week of all employees of the City should consist of 40 hours of work.

On January 1, 1952 the Plaintiffs and all other police of the City were placed on a work week schedule of 40 hours.

On January 7, 1952 the Philadelphia Home Rule Charter became effective and a new City administration was inducted into office. On that same date the new Civil Service Commission appointed under the Home Rule Charter promulgated Emergency Civil Service Regulations and Supplemental Emergency Civil Service Regulations A, B, C and D all dated January 7, 1952.

Regulation XIX of the Emergency Civil Service Regulations directed the Personnel Director to submit a plan for hours of work, holidays, annual vacation and sick leave for the various classifications of positions in the civil service. Regulation XXVII, Section 2 of the Emergency Regulations provided that until a pay plan, as prescribed in the Emergency Regulations, had been adopted the pay plan in effect immediately prior to January 7, 1952 should operate as the pay plan prescribed in the regulations. Supplemental Emergency Regulation A provided that commencing January 7, 1952 the hours of work, the rates of pay and the determination of compensation of all City employees should be as legally established on October 26, 1951 and that Section 2 of Regulation XXVII of the Emergency Regulations was thereby superseded. On that same date the Civil Service Commission ordered (1) that the Emergency Civil Service Regulations be submitted to the Law Department for approval and that Supplemental Regulation A also be

submitted to the Administrative Board for approval and (2) by reason of the existing emergency created by the changes in the form of City government and the fact that any delay in the effective date of the regulations would adversely affect the operations of the City and the public health and safety, the Mayor was requested, pursuant to §8-407[1] of the Home Rule Charter, to suspend the require-

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[1] §8-407. REGULATIONS. Except as otherwise specifically provided in this charter, every department, board and commission is hereby empowered to make such reasonable regulations as may be necessary and appropriate in the exercise of its powers and the performance of its duties under this charter or under any statute or ordinance. Except as otherwise provided in this charter, in the adoption of regulations, the following procedure shall apply:

(a) The department, board or commission promulgating the regulations shall first submit them for approval to the Law Department and upon receiving such approval file them with the Department of Records where they shall be available for public inspection for thirty days;

(b) The Department of Records shall give public notice of such filing by advertising in the three daily newspapers of the City having the largest paid circulation the fact that regulations relating to a particular subject have been filed with it, and that any person affected thereby may request a hearing;

(c) If any person affected shall present to the Department of Records a written request therefor, he shall be afforded a public hearing before the department, board or commission promulgating the regulations and the City Solicitor. A report of the hearing reaffirming the regulations or modifying them with the approval of the Law Department shall be filed by the department, board or commission with the Department of Records.

The regulations shall become effective at midnight of the thirtieth day after their filing when no hearing has been requested and at midnight of the tenth day after a report has been filed when a hearing was requested and held.

All regulations shall be published and made available for distribution.

Amendments to regulations shall be adopted under the same procedure as the regulations which they amend.

The requirements of this section may be suspended by the Mayor in writing and temporary regulations promulgated in emergencies affecting the public health or safety but any regulations so put into force shall not remain effective unless the procedures otherwise required by this section are complied with forthwith.

ments of §7-400[2] which made regulations effective at midnight of the 30th day after their filing; and that he direct that the Emergency Regulations become effective immediately.

The Emergency Civil Service Regulations and Supplemental Civil Service Regulations were approved by the City Solicitor. Supplemental Regulation A was approved by the Administrative Board and Mayor Joseph S. Clark, Jr. suspended the requirements of §7-400 and §8-407 of the Home Rule Charter and directed that the Emergency Civil Service Regulations and Supplemental Regulation A should become effective immediately.

Supplemental Regulation A was filed with the Department of Records on January 7, 1952 and the filing was advertised in the three major daily newspapers of the City.

Prior to October 29, 1951 there was no uniform work week for City employees. White collar workers were working from 33 to 56 hours per week (R. 192a, 195a). In general office workers were working either 37½ or 40 hours per week. Trades and labor employees were working 40 hours and 44 hours, and some were working 48 hours. The

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[2] §7-400. PREPARATION AND ADOPTION. The civil service regulations shall be prepared by the Personnel Director. Regulations pertaining to the position classification plan, pay plan, hours of work, holidays and annual vacation and sick leave shall be submitted by the Personnel Director for approval to the Civil Service Commission and Administrative Board. All other civil service regulations shall be submitted by the Personnel Director for approval to the Civil Service Commission only. After the requisite approvals shall have been obtained, the regulations shall be filed by the Personnel Director with the Department of Records, where they shall be available for public inspection for thirty days; and public notice of such filing shall be given as in the case of other regulations.

If any person affected by the proposed regulations or any citizen shall present to the Department of Records a written request therefor, he shall be afforded a public hearing before the Commission. The Commission may after a hearing reaffirm its approval or direct that the regulations be changed but any modification of a regulation which required initially the approval of the Administrative Board shall be submitted to it for approval. The subsequent procedure shall be the same as in the case of other regulations.

uniformed forces, including firemen, police and park police were working 48 hours per week (R. 194a, 197a). From January 1, 1952 to January 7, 1952 the police, park police and firemen worked a 40-hour week. Upon the adoption of Supplemental Regulation A, the police, park police and firemen returned to a regular 48-hour work week.

On December 30, 1952 the Civil Service Commission of Philadelphia approved a set of regulations, including a revised Regulation XIX dealing with classification of positions, pay scales, hours of work, holidays, vacation and sick leave. Under revised Regulation XIX, the Plaintiffs and all members of the Police Department were retained on a 48-hour work week schedule. On December 31, 1952 the then Mayor of Philadelphia suspended the requirements of §7-400 and §8-407 of the Home Rule Charter by reason of the emergency affecting the public health and safety and directed that the regulation should become effective January 1, 1953. This revised Regulation was filed with the Department of Records and advertisement of such filing was made in the three major City newspapers on January 6, 1953. Employees other than the uniformed forces were placed on a regular 37½ hour or 40 hour work week. No request for a public hearing was made with respect to this revised Regulation.

The appropriation for personal services made to the Police Department in the 1952 operating budget made no provision for the salaries of the additional personnel who would have been required to maintain the same police coverage in the City by reason of the reduction in hours from 48 to 40. Neither did it make any provision for the payments of overtime at overtime rates for a 48-hour work week for the existing police.

Subsequent City budgets through 1956 made no appropriation for reducing the work week of the uniformed forces below 48 hours per week. In the 1957 budget the Mayor recommended and Council approved an additional appropriation to the Police Department to permit the re-

duction of the regular work week from 48 to 44 hours, where it remained through 1959. In the 1960 budget, upon the recommendation of the Mayor, an additional appropriation for personal services was made to the Police Department to provide for the reduction of the regular work week from 44 to 42 hours where it still remains.

Plaintiffs commenced this proceeding on February 1, 1955 by filing a Complaint in Mandamus on their own behalf and on behalf of all policemen and park police to compel the defendants to make payment at overtime rates for working a 48-hour work week since January 7, 1952 and demanding restoration of the 40-hour work week to all police and park police. They alleged that Supplemental Regulation A effective January 7, 1952 and revised Regulation XIX effective January 1, 1953, were invalid because (1) they were not approved by the Administrative Board, (2) they were not properly advertised, (3) there was no emergency affecting public health and safety which justified suspension of §8-407 of the Home Rule Charter, (4) the regulations were unconstitutional as class legislation and discriminated against policemen, and (5) Civil Service Regulations were ineffective to repeal the ordinances of October 29, 1951 and January 2, 1952.

Defendants filed Preliminary Objections. An Amended Complaint was filed April 11, 1955. Defendant's Preliminary Objections to the Amended Complaint were overruled in 1955. Thereupon Defendants filed an answer to the Amended Complaint with New Matter to which the Plaintiffs filed an Answer. On September 7, 1955 Plaintiffs moved for judgment on the pleading against Defendants, which motion was denied. Upon appeal to the Supreme Court of Pennsylvania the action of the court below was affirmed. *Baxter v. Philadelphia*, 385 Pa. 424 (1956).

The case was finally tried before Judge Ethan Allen Doty of the Court of Common Pleas of Philadelphia County on September 14th to September 18th, 1964. By that time the following officers who were in office on January 7, 1952 had

died: Managing Director Robert K. Sawyer; Chairman of the Civil Service Commission Shippen Lewis; Commissioner of Records A. Albert Cherashore; Personnel Director Frank Escabedo. The following were no longer in office: Mayor (now United States Senator) Joseph S. Clark, Jr.; Managing Director Vernon D. Northrop; Personnel Director Donald C. Wagner; City Treasurer George DiLauro; Finance Director Richard J. McConnell; Police Commissioner Thomas J. Gibbons.

Judge Doty rendered his verdict in favor of the Defendants [Appellees herein] and dismissed the Plaintiffs' Amended Complaint on the grounds that (a) Supplemental Regulation A was proper and valid and superseded the Ordinances of October 29, 1951 and January 2, 1952, (b) Supplemental Regulation A was validly superseded by revised Regulation XIX effective January 1, 1953 and (c) there was no appropriation in the 1952 budget which was intended to be or which became available for the payment of overtime to the Plaintiffs or those in the same class as Plaintiffs.

The Plaintiffs filed 60 exceptions to the decision of Judge Doty. These exceptions were argued before the court en banc on December 17, 1965. The exceptions were dismissed and judgment entered for the Defendants on the verdict on March 14, 1966.

On June 13, 1966, just one day before the 90-day period for filing an appeal elapsed [Act of May 19, 1897 P. L. 67 §4 as amended, 12 P. S. §1136], Appellants asked the Supreme Court of Pennsylvania to reverse the Court of Common Pleas of Philadelphia and enter judgment in their favor in the Action of Mandamus. On June 29, 1967, the Supreme Court of Pennsylvania without dissent affirmed the judgment of the Court of Common Pleas of Philadelphia County that Appellants were entitled to no relief.

On September 27, 1967, the last day for taking an appeal, Appellants filed their notice of appeal with your Honorable Court, and their Jurisdictional Statement was filed on November 27, 1967, the last day for filing such.

ARGUMENT.

I. INVALID DELEGATION OF LEGISLATIVE POWER ARGUMENT NOT PRESENTED TO NOR PASSED UPON BY STATE COURTS.

Appellants in their Jurisdictional Statement assert for the first time that the Philadelphia Civil Service Regulations are invalid because they are the product of "an invalid delegation of legislative power." The thrust of Appellants' argument is that there is some "separation of power principle" which is violated by the Civil Service Regulations applicable in this case. Irrespective of the merits of this contention, it must be noted that the state courts in this case were not presented with this issue nor did they pass upon it. There is no reference in the initial complaint in mandamus with respect to this particular allegation nor does the contention appear in Appellants' brief to the Supreme Court of Pennsylvania, nor in its Notice of Appeal to the Supreme Court of the United States.[1]

Your Honorable Court has clearly and wisely held that it will not consider an argument which was not raised, considered, or passed upon by the State Court below. *Beck v. Washington*, 369 U. S. 541, 553-554, 8 L. ed. 2d 98, 109 (1962); *Head v. New Mexico Board of Examiners*, 374 U. S. 424, 432, 10 L. ed. 2d 983, 990 (1963) [Footnote 12]. Since Appellants have not seen fit to grant the State Courts of Pennsylvania the opportunity to consider a ground of constitutional attack upon one of Pennsylvania's laws, your Honorable Court is respectfully asked out of consideration of comity to refuse to consider the delegation of legislative power argument first raised in this appeal.

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[1] The text of Appellants' Complaint in Mandamus is attached to this Motion as Appendix A; the index to Appellants' brief to the Supreme Court of Pennsylvania in this case is printed hereafter as Appendix B.

II. NO SUBSTANTIAL FEDERAL QUESTIONS ARE RAISED BY THIS APPEAL.

A. Philadelphia Civil Service Regulations are not the product of an invalid delegation of legislative power.

Appellants in attempting to argue that the Philadelphia Civil Service Regulations are unconstitutional as an invalid delegation of legislative power fail to indicate what specific provision of the United States Constitution is thought to invalidate the regulations. The "separation of powers principle" arises from the provisions of the United States Constitution vesting the legislative power in the Congress. There is nothing in the Federal Constitution imposing upon states or their organic subdivisions a like requirement. Under the Constitution, states are free to organize their government and distribute the legislative, executive and judicial powers in any manner they see fit providing that no specific federally protected right is violated. Thus, in *Highland Farm Dairy, Inc. v. Agnew*, 300 U. S. 608, 81 L. ed. 835 (1937), your Honorable Court refused to declare unconstitutional as an unlawful delegation of legislative power the Virginia Statute establishing the Virginia State Milk Commission.

In a learned opinion by Mr. Justice Cardoza, it was said:

> "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."
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> "Cases such as *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241, and A. L. A. *Schechter*

> *Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947, cited by appellants, are quite beside the point. What was in controversy there was the distribution of power between President and Congress, or between Congress and administrative officers or commissions, a controversy affecting the structure of the national government as established by the provisions of the national Constitution."

See also *Sailors v. Board of Education of County of Kent*, 254 F. Supp. 17 (W. D. Mich. 1966).

Furthermore, it is clear that there can be no invalid delegation of legislative power, where under the organic law involved, the power in issue is not reserved to the legislature. See 16 AM. JUR. 2d *Constitutional Law*, §242. Under the Philadelphia Home Rule Charter approved by the electors on April 17, 1951, which Charter is the organic law for Philadelphia, the function of establishing terms and conditions of employment of individuals hired by the City of Philadelphia is reserved to the executive and administrative branch of the City of Philadelphia and more particularly the Personnel Director who is required to prepare detailed Civil Service Regulations and administer the Civil Service program thereunder.[2] [Section 7-100 of the Charter.] Accordingly, since we are not concerned with the exercise of the legislative function, there can be no constitutional invalidity even assuming that the "separation of powers principle" contained in the United States Constitution is applicable to the exercise of power by an organ of one of the states.

Appellants' reliance in their Jurisdictional Statement upon *Panama Refining Company v. Ryan*, 293 U. S. 388, 79 L. ed. 446 (1935), and its progeny moreover is clearly misplaced. That case involved a controversy as to distribution

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[2] The provisions of the Philadelphia Home Rule Charter dealing with the terms and conditions of employment of individuals by the City are printed hereafter as Appendix C.

of power between the president and Congress; no issue was raised as to the propriety of distribution of power by a state among its governmental organs. Specifically involved in that case was the validity of a presidential executive order prohibiting the transportation of oil in interstate commerce in excess of amounts allowed by any state law; the order was purportedly authorized by Section 9(c) of the National Industrial Recovery Act. Your Honorable Court quite properly held that Section 9(c) contained no standard to govern the President's course of action nor required any findings by the President as a condition of this action, but gave "to the president an unlimited authority to determine the policy and lay down the prohibition, or not to lay down as he may see fit." 293 U. S. 415, 79 L. ed. 456. The Civil Service Regulations involved in this case here were not the product of the unbridled exercise of power by the Personnel Director. The standards and policies to be applied in formulating the Regulations were and are specifically set forth in the Home Rule Charter [See Appendix C particularly Section 7-401], the organic law for the City of Philadelphia. No contention is made in this appeal that the Regulations as adopted do not in fact comply with these standards and policies; even if such an issue were raised, it would be a purely state problem and would present no federal constitutional problems.

B. Civil Service Regulations do not violate due process of equal protection clauses of the Fourteenth Amendment.

Appellants assert that the Philadelphia Civil Service Regulations adopted in 1952 in requiring the police to work 48 hours while other City employees were permitted to work a 40-hour week was in some way a violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. It is submitted that this contention is patently erroneous.

The standard by which a particular state statute or municipal ordinance or regulation is to be tested when attacked as a violation of the Equal Protection clause has recently been reiterated by your Honorable Court in *McGowan v. Maryland*, 366 U. S. 420, 6 L. ed. 2d 393 (1961); Mr. Chief Justice Warren said at 366 U. S. 425-426, 6 L. ed. 2d 399:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Likewise, in *Lindsley v. Natural Carbonic Gas Company*, 220 U. S. 61, 55 L. ed. 369 (1911), it was said with respect to this argument:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of

facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Applying these standards and rules to the facts of this case, it is submitted that the Philadelphia Civil Service Regulations adopted in 1952 in so far as they provided different hours of work for policemen as opposed to other City employees cannot be said to be unreasonable or outside the scope of discretion that all municipalities must possess in setting terms and conditions of employment for their employees. There is no reason why the City cannot vary the work conditions of different classes of its employees. By definition, jobs vary. The work performed by policemen differs from that performed by laborers, skilled or unskilled, or clerical workers employed by the City. The rates of pay differ for different jobs and so also do hours of work. The number of hours worked at the job is a function of the compensation received. The gravamen of Appellants' complaint is not that they were forced to work longer hours than other City employees, but that they were forced to work longer hours without receiving what they considered adequate compensation. In the context of the conditions in 1952, the sudden reduction of policemen from a 48-hour to a 40-hour week, where no monetary appropriation had been made for police overtime, would have resulted in a 20% reduction in police coverage. As noted by the Supreme Court of Pennsylvania in this case:

"It takes little imagination to suggest that in a metropolis like Philadelphia such a sudden reduction in coverage posed dangers to the public safety." 426 Pa. 240, 251 (1967).

Accordingly, it is clear that the municipal authorities were

justified in refusing to accede to Appellants' demand for this 20% reduction in hours of work.[8]

Moreover it is submitted that if the City had acceded in 1952 to the demands of Philadelphia policemen for the reduction of the regular 48-hour work week to a 40-hour work week, this would not mean that policemen would in fact work only 40 hours. What it would mean is that they would have received overtime for any hours worked over 40 hours. Accordingly, a reduction in the length of a work week would be the equivalent of an increase in compensation for the employees affected. Viewed in this light, it cannot be said that the Civil Service Regulations here in issue may not recognize differences between different classes of employees by fixing different compensations and conditions of employment therefor.

The placing of policemen and firemen in a separate class has been upheld by courts in other state jurisdictions.

"In *Styring v. City of Santa Ana*, 64 Cal. App. 2d 12, 147 P. 2d 689 (1944), a statute requiring cities having paid fire departments to grant regular members of such fire departments leaves of absence of not less than 15 days each year was declared valid as 'general' rather than 'special' legislation. The reason for the classification was found in the nature of the services performed by the members of fire departments which differed from the work of other municipal employees. Such a classification was upheld as intrinsic, natural and reasonable."

Likewise, in *Fabio v. City of St. Paul* 267 Minn 273 126 N. W. 2d 259 (1964), the Supreme Court of Minnesota upheld a state statute requiring policemen who actually

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[8] It is to be remembered that the policemen are presently working 42 hours a week which resulted from a gradual reduction in hours of work as conditions permitted and appropriations became available to pay for additional police personnel. In 1957 the regular work hours of Philadelphia policemen were reduced from 48 hours to 44 hours and in 1960 they were further reduced to 42 hours where they presently remain.

engaged in street patrol and front-line crime prevention to retire at the age of 65 despite the fact that some policemen who were employed in administrative duties or as park or playground guards were not so required to retire. The court noted that the valid classification for purposes of equal protection does not depend upon ironclad uniformity.

The Supreme Court of Pennsylvania in this case has specifically held that the Civil Service Regulations involved here do not offend the principle of equal treatment for those equally situated. It has recognized the valid interest that every municipality must have in the security of its citizens from criminal elements. The Supreme Court of Pennsylvania in the opinion in this case held that:

> ". . . [W]e are convinced that the peculiar sensitivity of the public interests protected by police, especially in the circumstances present in the instant case, justify such differences as existed between treatment by the city of its police and other employees. Indeed, we should be very reluctant to invalidate any measures through which government varies the wages and working conditions of public employees according to the functions they perform. Government must have broad discretion in adjusting incentives for public employment if it is to compete successfully in the labor market to provide adequately and economically services essential to the public weal. It is not difficult to envision the disruption and disservice which would result to the public welfare if the courts were to substitute their relatively uninformed judgment for the sophisticated expertise required in this area." 426 Pa. 240 at 253.

The weakness of Appellants' "equal protection argument" is demonstrated by the cases upon which they rely to sustain the jurisdiction of your Honorable Court. The case of *Healy v. Ratta*, 67 F. 2d 554 (1st Cir. 1933), involved a New Hampshire statute with respect to licensing

of peddlers which statute contained so many incongruities and irrational distinctions that it was held to violate the Equal Protection clause of the federal Constitution. As pointed out by the Court of Appeals in that case:

". . . It is virtually conceded by counsel for the appellant that section 11, exempting citizens of New Hampshire over 70 years of age from paying any license fees, violates section 1 of article 14 of the Amendments to Federal Constitution. If this were the only unconstitutional provision, it might not affect the entire act. Section 3 of the act, however, contains so many discriminatory provisions and unreasonable classifications that clearly deny the complainant equal protection under the law and deprive him of equal privileges with venders of other articles of merchandise, and so vitally affect the entire act that we think the act as a whole must fall."

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"A statute that permits one to sell household articles from house to house by sample, but not to deliver at time of sale without a license; to sell and deliver at the time of sale fruit trees, vines and shrubs without a license, but not evergreen trees, shade trees, strawberry plants or rhubarb or asparagus roots; which permits a farmer to peddle without a license the fruit he raises, while one who does not raise them may not; which permits a manufacturer to sell without a license some articles of household use, but not furniture; which permits the sale of provisions, but not of shoes, brushes, combs, needles, or thread, unless the product of the salesman's own labor; which permits the sale of books, newspapers, and pamphlets, but not of magazines; which permits without a license the sale from house to house of hoes, shovels, scythes, or rakes for the farmer, but not a vacuum cleaner for the housewife—cannot be sustained as promoting the health, safety, morals, or welfare of the public, and clearly

deprives the complainant of his constitutional rights and privileges secured to him under article 4 and the Fourteenth Amendment of the Federal Constitution." 67 F. 2d at 557-558.

Likewise, it strains reason to find support for Appellants' argument in this case with respect to discrimination between policemen and other City employees by citing the opinion of your Honorable Court in *McLaughlin v. Florida*, 379 U. S. 184, 13 L. ed. 2d 222 (1964), wherein the prohibition by Florida of interracial cohabitation was declared unconstitutional. Finally, there is absolutely no similarity between this case and the case of *Wieman v. Updegraff*, 344 U. S. 183, 97 L. ed. 216 (1952). We are not involved here as in that case with a dismissal from public employment on grounds of subversive activities or disloyalty which your Honorable Court found to constitute such "a badge of infamy" as to require procedural safeguards such as notice and hearing to be justified under the Constitution.

For all the above reasons, it is submitted that the classifications adopted by the Philadelphia Civil Service Regulation are not unreasonable and do not constitute invidious discrimination nor unequal treatment for those equally situated.

C. The Philadelphia Civil Service Regulations do not impair the obligation of any contract.

Appellants in this appeal contend that the ordinance of October 29, 1951, establishing a forty-hour work week for all City employees including policemen created a contract between Appellants and the City of Philadelphia and vested rights in the Appellants which could not be abrogated by the subsequent adoption of the Philadelphia Home Rule Charter on January 7, 1952, and the promulgation pursuant thereto of a civil service regulation providing a forty-eight hour work week for policemen.

It is submitted that there is no merit whatsoever to this contention. It has long been established that there is no vested or contract right to public office nor the particular terms and conditions of public employment. As pointed out by your Honorable Court as long ago as 1850 in the case of *Butler v. Pennsylvania*, 10 How. 402, 414-415, 13 L. ed. 472, 478-479 (1850):

> "The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures.
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> "We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term 'contracts',

or, in other words, the vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good, functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them."

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"The precise question before us appears to have been one of familiar practice in the State of Pennsylvania, so familiar, indeed, and so long acquiesced in, as to render its agitation at this day somewhat a subject of surprise. . . ."

As more recently succinctly pointed out in *Bailey v. Richardson,* 182 F. 2d 46 (D. C. Cir. 1950), aff'd 341 U. S. 918, 95 L. ed. 1352 (1951): "It has been held repeatedly and consistently that Government employ is not 'property' and that . . . it is not a contract" [182 F. 2d at 57]. See also *Crenshaw v. United States,* 134 U. S. 99, 33 L. ed. 825 (1890); *Stephens v. City of Billings,* 422 P. 2d 342 (Supreme Court of Montana, 1967); ann.: Power to abolish or discontinue office 172 A. L. R. 1366 (1948).

Your Honorable Court has rejected the contention sought to be raised by Appellants in this appeal in *Dodge v. Board of Education,* 302 U. S. 74, 82 L. ed. 57 (1937), where it was stated that:

". . . [a]n act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employe of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." 302 U. S. at 78-79, 82 L. ed. at 62.

Appellants' argument is refuted by the very authority they cite. In seeking to find some contract or vested right in the forty hour work week established by the repealed ordinance of October, 1951, Appellants cite at p. 7 of their jurisdictional statement, McQuillin, *Municipal Corporations*, p. 196, §21.15, for a proposition that the repeal of an ordinance cannot deprive a person of rights acquired under it. Upon examination of this section, it is clear that Appellants can gain no support therefrom for their contentions since the section specifically states that "an ordinance may be repealed as against a municipal employee . . . who could not and has not acquired any vested rights under the ordinance". The section further states that,

> "police power cannot be contracted away by an ordinance and rights acquired under an ordinance although contractual or vested are subject to the repeal of the ordinance where the repeal constitutes a proper exercise of the police power as it does where the repeal is necessary to protect the public health, welfare or morals. . . ."

As authority for this statement McQuillin cites the case of *Stephens v. Billings*, 422 P. 2d 342 (1967), where the Supreme Court of Montana held that City firemen had no vested rights in a repealed municipal ordinance making seniority the basis of promotion and that accordingly repeal of the ordinance was not unconstitutional.

Appellants have the burden of showing that they have acquired vested rights or contract rights, which could not be impaired by subsequent legislation. The function of an ordinance, and in this particular civil service regulations, is to make law or declare public policy and not create employment contracts. *Dodge v. Board of Education*, supra. Appellants have not pointed to any facts in the present case which would compel a contrary conclusion. The Supreme Court of Pennsylvania has consistently held that the terms and conditions of public employment are subject to change and that a government employee has no vested contractual

right in such terms and conditions. *Philadelphia Civil Service Commission v. Eckles*, 376 Pa. 421 (1954); *Jordan v. Kane*, 389 Pa. 1 (1957); *Kelly v. Jones*, 419 Pa. 305 (1965); *Baxter v. Philadelphia*, 426 Pa. 240 (1967). What the Supreme Court of Pennsylvania said in the *Kane* case, supra, is particularly applicable here:

> "Appellant, in effect, seeks a decision that the salary rights and conditions of employment of each government employe are unshakably determined by the most favorable law in effect during his employment. Were we so to hold, the resulting patchwork quilt of salary distinctions, preventing uniform treatment of all employees in a given classification, would cause inequities, impair morale, curtail experimentation in wage and salary programming, and hence, impede the effective administration of government." 389 Pa. at 4.

These constructions of the effect of civil service regulations and ordinances adopted by Pennsylvania municipalities with respect to the terms and conditions of public employment by the highest court of the State of Pennsylvania is entitled to great weight.

For all the foregoing reasons, it is submitted that Appellants have failed to indicate how the adoption pursuant to the Home Rule Charter of civil service regulations providing for a forty-eight hour work week for Philadelphia policemen impaired the obligation of any contract within the meaning of Article I, Section 10 of the United States Constitution. Accordingly your Honorable Court is requested to dismiss this appeal.

III. THE APPELLANTS ARE GUILTY OF LACHES.

The Appellants by their delay of over three years in instituting action and of over 12 years after the occurrence of the events complained of in bringing this case to trial

have caused great harm to the City of Philadelphia. It has caused the accumulation of a potential liability for overtime pay for police and park police alone in excess of $50 million through 1964. If the members of the Fire Department, who would also be affected by a decision adverse to the City, were added, the City's potential liability to the end of 1964 would be in excess of $100 million. Further, high officials of the City who were personally familiar with the circumstances surrounding the adoption of the Civil Service regulations involved here are either deceased or are no longer employed by the City. By reason of the long delay memories have become dim and there has been difficulty in locating records.

The effect of the unavailability at trial of key personnel due to the Appellants' delay was brought into sharp focus by the conduct of Plaintiffs' counsel at the trial. He repeatedly objected to the testimony of City officials who were custodians of official records because they did not occupy their positions on January 7, 1952. For example, he repeatedly objected to testimony of Foster Roser, presently Personnel Director, because Mr. Roser did not hold that office in 1952 (R. 442a, 444a). He objected to the testimony of former City Archivist Charles Hughes, testifying as to the records maintained in his office, because Mr. Hughes did not hold that position in January of 1952 (R. 130a, 131a). He made a point of the fact in cross-examination that the Secretary of the Administrative Board, who testified as to the authenticity of the minutes of the Board, was not the Secretary in 1952 (R. 565a-566a), and that she had not prepared the minutes of the Administrative Board relating to meetings in 1952 and 1953 approving the Civil Service Regulations at issue, which the City offered in evidence (R. 568a). Throughout the trial, Appellants' counsel made repeated objections to the authenticity of official documents offered by the City (R. 178a, 193a, 559a, 562a), principally because the witnesses now called to testify as to these documents were not City employees in 1953, when the documents were prepared.

He also questioned the City witnesses at length and in minute detail as to their recollection of matters that transpired over twelve years previously. See, for example, the cross-examination of William Rafsky, the City witness called as Executive Secretary to the Administrative Board in 1952. For fifteen pages of the Record, counsel for Plaintiffs took the witness through a minute examination concerning the preparation of minutes of the meetings of the Administrative Board in 1952, the origin of the various memoranda in the files of the Administrative Board, the exact circumstances and the exact time of preparation of various memoranda and the precise reason why certain statements were included in various minutes and memoranda.

Moreover, the Appellants delayed taking their appeal to the Pennsylvania Supreme Court until practically the very last day of the three-month period permitted by the Act of May 19, 1837, P. L. 67, as amended, 12 P. S. §1136.

Finally, Appellants delayed taking their appeal to your Honorable Court until the very last day permitted under the Act of June 25, 1948 C. 646, 62 Stat. 961 as amended, 28 U. S. C. A. §2101(c), and likewise delayed filing their Jurisdictional Statement until the last day permitted by Rule 13 of your Honorable Court.

It is clear, therefore, that Appellants' delay produced precisely the objectionable result at which the rule of laches is aimed, that is unavailability of witnesses, the inability of witnesses to recall things that happened in the distant past, and the existence of circumstances surrounding the preparation of various documents.

It is submitted that Appellants' dilatory conduct in the institution and prosecution of this case presents a classic case of laches, justifying the Supreme Court of Pennsylvania in affirming the lower Court and dismissing their appeal.

This case has been in litigation over 12 years. No further delay in finally resolving this controversy is warranted.

Accordingly your Honorable Court is respectfully requested to dismiss this appeal.

IV. PLAINTIFFS WERE AMONG THE CLASS INTENDED TO BE BENEFITED BY THE CASE OF O'DONNELL v. PHILADELPHIA, 385 PA. 189 (1956): ARE BOUND BY THE OUTCOME OF THAT ACTION AND CANNOT MAINTAIN A SUBSEQUENT ACTION INVOLVING THE SAME SUBJECT MATTER.

It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were either admitted or judicially determined are conclusively settled by a judgment rendered in such action. Such facts or questions become res adjudicata.

An exception to the general rule that no person is bound by a prior action except those who were parties or who stand in privity with others who were parties exists in so-called class actions. Section 86 of the Restatement of the Law of Judgments states the proposition thusly:

> "A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action."

See *Pentland v. Dravo Corp.*, 152 F. 2d 851 (3rd Cir. 1945), and *Shipley v. Pittsburgh & L. E. R. Co.*, 70 F. Supp. 870 (D. C. Pa. 1947).

Applying these principles to the present situation, we find that the case of *O'Donnell v. Philadelphia* was a proceeding instituted on behalf of all employees of the City of Philadelphia other than those employed in the Department of Public Works, to recover overtime pay for regular work weeks in excess of 40 hours each week during the year 1952.

There can be no doubt that the Appellants in the instant action were included in the class for which the *O'Donnell* suit was instituted. The Petition for Declaratory Judgment in that case stated:

> "2. The petitioners, Laurence O'Donnell, Louis Snyder, Samuel Leibowitz, James Kavanaugh and Joseph Curran are presently employees of the Department of Public Property of the defendant, City of Philadelphia, and were so employed on and after January 1, 1952, and *file this petition on behalf of themselves and all other employees of the City of Philadelphia who were so employed on and after January 1, 1952*, with the exception of those employees who during those years were members of the Bureau of Street Cleaning, the Bureau of Highways, the Bureau of Water and the Department of Mechanical Equipment, and who were paid overtime for all hours over forty worked during the weeks of the year 1952." (Emphasis supplied.)
>
> (From the Record, C. P. No. 7, December Term, 1953, No. 3255.)

This Court in *O'Donnell* recognized that the matter before it was a class action by stating at the outset of its opinion:

> "This is a declaratory judgment proceeding instituted by a C.I.O. Local, Philadelphia Civil Service Employees' Association, and five individual employes of the city, *allegedly on behalf of all the city employes other than those employed in the Department of Public Works*, to recover pay for work performed in excess of 40 hours each week during the year 1952." (Emphasis supplied.)

The issues presented in *O'Donnell* and those presented here are the same. This Court there held that the Ordinance of January 2, 1952 purporting to establish the 40-hour work week was superseded by Supplemental Emergency Regulation A, which reinstated the 48-hour work week. This Court

also declared that there was no appropriation in the City's 1952 Budget which was intended by Council to be, or which in effect became available for the payment for overtime work of City employees for regular work weeks in excess of 40 hours other than those specifically and to the extent provided for in the Department of Public Works under the union agreement. See *American Federation of State, County and Municipal Employees, District Council No. 33 v. Philadelphia*, 83 D. & C. 537 (1952).

Under the doctrine of res adjudicata the conclusiveness of the holding in a prior case extends not only to matters actually determined but also to other matters which could properly have been determined in that action: *Central Penna. Lumber Co. v. Carter*, 348 Pa. 429 (1944); *Schenley Farms Co. v. McGovern*, 312 Pa. 67 (1933); *Long v. Lebanon National Bank*, 211 Pa. 165 (1905); *Miller v. Dierken*, 157 Pa. 63 (1944); *American Water Works & Electric Co. v. Allegheny Trust Co.*, 125 F. 2d 551 (3d Cir. 1941).

Hence, *O'Donnell*, supra, is not only res adjudicata as to the questions specifically decided but is also res adjudicata as to all issues which were not raised but which could have been raised therein, including: a claim for recovery based on a 40-hour week for years subsequent to 1952; a claim that an emergency did not exist justifying the passage of emergency regulations which waived the 30-day waiting period; a claim that there was improper advertising of the regulations; a claim that Supplemental Regulation A and revised Regulation XIX was not approved by the Administrative Board; and a claim that the Regulations were discriminatory and, therefore, unconstitutional.

It is not significant that the form of action in *O'Donnell*, supra, was by way of petition for declaratory judgment while in the present case it is an action in mandamus since the subject matter is identical. The Plaintiffs would still be precluded from recovery under the principle of collateral estoppel. As the Pennsylvania Supreme Court declared in *Larsen v. Larsen*, 392 Pa. 609, 612 (1958):

> ". . . if the parties to an action have had an opportunity to appear and be heard in a prior proceeding involving the same subject matter, all issues of fact which were actually adjudicated in the former action and essential to the judgment therein are concluded as between the parties even though the causes of action in the two proceedings are not identical. . . ."

Also see *Thal v. Krawitz*, 365 Pa. 110, 112-113 (1950); Restatement, *Judgments*, §68 (1).

Whether the applicable principle be that of res adjudicata or collateral estoppel, the Appellants were barred from recovery in either event. Accordingly it is submitted that the Supreme Court of Pennsylvania was justified in affirming the dismissal of Appellants' action, that the judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis and that accordingly the appeal should be dismissed.

CONCLUSION.

For all the above reasons Appellee City of Philadelphia respectfully requests your Honorable Court to dismiss this appeal.

Respectfully submitted,

FRANK J. PFIZENMAYER,
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MATTHEW W. BULLOCK, JR.,
Second Deputy City Solicitor,
LEVY ANDERSON,
First Deputy City Solicitor,
EDWARD G. BAUER, JR.,
City Solicitor.

APPENDIX A.

AMENDED COMPLAINT IN MANDAMUS.

1. Plaintiffs Albert W. Baxter, James Loughran, Harry E. Povey, Francis E. Knoll, Maurice J. O'Leary, Edward O'Keefe, James Maloney, Franklin P. Fry, Herman Alexander, Edgar Watts, Frank C. Barone, Howard E. Miller, and Ralph Colaberadino are policemen employed by the City of Philadelphia; plaintiffs William Courtney and John P. Coan are crime investigation officers employed by the City of Philadelphia; plaintiffs Salvatore A. Maiorana and William Anson are retired policemen on pension.

2. All of said plaintiffs were appointed to their respective positions after test and certification by the Civil Service Commission of the City of Philadelphia prior to January 7, 1952 and were so employed in their respective capacities by the City of Philadelphia on January 7, 1952.

3. Plaintiffs Salvatore A. Maiorana and William Anson retired subsequent to January 7, 1952 and are presently on pension.

4. Defendant Joseph S. Clark, Jr., is the duly elected Mayor of the City of Philadelphia.

5. The other defendants herein are appointees of the defendant Joseph S. Clark, Jr., in accordance with the Philadelphia Home Rule Charter.

6. On October 29, 1951, the Honorable Bernard Samuel, then Mayor of the City of Philadelphia, approved an ordinance of City Council establishing a standard work week for employees of the City of Philadelphia. The ordinance provided as follows:

"Section 1. The Council of the City of Philadelphia ordains, That on and after January 1, 1952, the standard work week of the employees of the City of Philadelphia and of the departments, bureaus, boards, commissions and other agencies thereof, shall consist of five work days.

Section 2. The heads of the various departments, bureaus, boards, commissions and other agencies of the City are authorized and directed to prepare and place into effect work schedules for their respective units in accordance with the provisions of Section 1 of this ordinance.

Section 3. The Mayor is hereby authorized and directed to execute and deliver an agreement between the City of Philadelphia and the American Federation of State, County and Municipal Employees, District Council No. 33, Philadelphia and Vicinity, further amending an agreement dated December 7, 1944, between the said parties, which amendatory agreement shall provide that the provisions under 'Hours of Work' shall be amended to read as follows:

"Hours of Work

1. The regular work week for the employees shall consist of a regular work week of forty (40) hours consisting of five (5) days of eight (8) hours each, Monday to Friday, inclusive.

2. If it becomes necessary, because of insufficient funds in the applicable appropriation for the payment of employees in any of the bureaus affected by this Agreement at any time during the year, and in order to provide insofar as practicable a forty (40) hour work week for each of the remaining weeks in the current year, a sufficient number of employees may be laid off on the basis of seniority and ability, provided that where ability in the opinion of the Employer is relatively equal, then seniority shall prevail, subject to review under the provisions of the section on 'Grievance Procedure' herein. The business agent of the

union involved shall be advised of the intended lay-off and given the opportunity of review by the Employer.

3. Overtime for all employees shall be compensated for at the rate of time and one half times the regular rate of pay and shall commence immediately upon the completion of eight (8) hours of work on any work day, or five (5) days in any work week, except for work performed on Sunday which shall be double time."

7. Prior to January 1, 1952, the plaintiffs and all other policemen in the City of Philadelphia were employees of the City of Philadelphia and were employed on a work week schedule of 48 hours a week, at an annual salary of $4,000, which was increased to $4,500 on January 1, 1953.

8. On or about January 1, 1952, the plaintiffs and all other policemen employed by the City of Philadelphia were placed on a work week schedule of 40 hours a week at an annual salary of $4,000, which was increased to $4,500 on January 1, 1953.

9. On January 2, 1952, the Honorable Bernard Samuel, then Mayor of the City of Philadelphia, approved an ordinance of City Council amending Section 1 of the Ordinance of October 29, 1951, as aforesaid, which amendment reads as follows:

"That on and after January 1, 1952, the standard work week of the employees of the City of Philadelphia and of the departments, bureaus, boards, commissions, and other agencies thereof shall consist of 40 hours of work."

10. On January 7, 1952, the Philadelphia Home Rule Charter, approved by the electorate of the City of Philadelphia on April 17, 1951, went into effect.

11. On January 7, 1952, the Civil Service Commission

approved the Philadelphia Emergency Civil Service Regulations and Supplements A, B, C, and D, all dated January 7, 1952. Regulation 19 of said Philadelphia Emergency Civil Service Regulations provided as follows:

"Hours of Work, Holidays, Vacation and Sick Leave.

Section 1. Formulation of Plan.

As soon as feasible after his appointment, the Personnel Director shall formulate and submit to the Commission a plan for hours of work, holidays, annual vacation and sick leave, which shall apply in the various classes of positions in the civil service.

Section 2. Adoption of Plan.

The Commission shall consider the plan submitted to it by the Personnel Director and after approval, with or without modification shall submit it to the Administrative Board for final action.

Section 3. Administration of Plan.

Upon the adoption of the plan, the Personnel Director shall be charged with its administration and enforcement. He shall institute such procedures and establish such means for administration and enforcement of the plan as he shall deem necessary to secure the effective operation of its provisions."

12. Supplemental Emergency Regulation A, which is pertinent to this action, provided as follows:

"Commencing Jan. 7, 1952 the hours of work and the rates of pay and the determination of compensation of all city employees shall be as legally established on Oct. 26, 1951. This supersedes Section 2 entitled 'Existing Pay Plan' of Regulation XXVII of the Emergency Regulations."

Regulation XXVII, Section 2 provided:

"Section 2. Existing Pay Plan.

Until a pay plan as prescribed in these emergency regulations has been prepared and adopted, the pay plain in effect immediately prior to January 7, 1952

shall operate as the pay plan prescribed in these regulations."

13. Said Regulation 19 of the Philadelphia Emergency Civil Service Regulations and Supplemental Regulation A were prepared and approved at the same time and are vague, inconsistent, contradictory and ineffective to repeal the Ordinances of Council dated October 29, 1951 and January 2, 1952.

14. Supplemental Regulation A of the Philadelphia Emergency Civil Service Regulations was approved by the Administrative Board and by the City Solicitor of Philadelphia, Abraham L. Freedman, Esquire, on January 7, 1952, as more fully appears by the Minutes of the Civil Service Commission dated January 7, 1952, and communications in the files of the Civil Service Commission, copies of which are attached hereto and marked "Exhibits A, B, C, D and E," respectively.

15. On January 7, 1952, the plaintiffs and all other policemen of the Police Department of the City of Philadelphia, by order of defendant Thomas J. Gibbons, Police Commissioner, approved by Frank J. Escobedo, the then Personnel Director, since replaced by defendant Donald C. Wagner, Francis D. Pastorius, the then City Treasurer, since replaced by George Di Lauro, defendants, Sidney B. Dexter, Chairman, Civil Service Commission, Leon I. Mesirov, member of, Civil Service Commission, Rev. E. Luther Cunningham, Member, Civil Service Commission, Joseph S. Clark, Jr., Mayor, City of Philadelphia, Robert K. Sawyer, Managing Director, and Vernon D. Northrup, Finance Director, were placed on a work week schedule of 48 hours a week at an annual salary of $4,000 for policemen, which was increased to $4,500 on January 1, 1953.

16. On December 14, 1951, the City Council of Philadelphia, by an Ordinance approved by Mayor Bernard Sam-

uel, adopted a financial program for the City of Philadelphia for the year 1952, and made appropriations to carry such program into effect, among which was an appropriation for the Department of Public Safety as follows:

> "'To the Department of Public Safety or its successors under the Philadelphia Home Rule Charter, including the Police Department, the Fire Department, the Department of Streets, the Department of Public Property, the Department of Licenses and Inspections and any other offices, departments, boards or commissions, to which the functions of the Department are transferred by the Charter, the sum of thirty-six million three hundred twenty-nine thousand sixty ($36,329,060) Dollars and twenty-six (26) cents, as follows:

Personal services	$31,000,842.26
Contractual services	2,373,535.00
Materials, supplies and equipment	1,771,640.00,
Sundry charges	56,770.00
Grants, subsidies, contribs.	1,126,273.00"

The said appropriations for Personal Services covered the payment of salaries to the members of the Police Department, including the plaintiffs herein, for the year 1952. The City Council of Philadelphia, similarly appropriated sums of money for the payment of Personal Services to the members of the Police Department, including the plaintiffs herein, for 1953, 1954, and 1955, in accordance with the provisions of Section 2-300 (2) of the Philadelphia Home Rule Charter.

17. Section A-200 (3) provided for an increase in the Budget of 1952, notwithstanding the prohibitions contained in Sections 2-300 and 2-301 of the Philadelphia Home Rule Charter. Said Section A-200 (3) reads as follows:

> "All appropriations made in the budget ordinance for the year 1952 shall be made to the then existing offices, departments, boards and commissions of the City or

their successors under this charter. Provisions shall also be made in the budget ordinance for the year 1952, for any offices, departments, boards or Commissions created by this charter to exercise new functions and any such provision may be increased in 1952 notwithstanding sections 2-300 and 2-301 of this charter."

18. Section A-110 of the Appendix to the said Philadelphia Home Rule Charter provides:

"The provisions in this Charter so far as they are the same as those of existing statutes or ordinances shall be construed as a continuation of such statutes or ordinances and not as new enactments."

19. By reason of the said provision in Section A-110 of the Appendix to the Philadelphia Home Rule Charter, the said Ordinances of City Council approved October 29, 1951, as amended on January 2, 1952, remained in full force and effect on January 7, 1952, when the said charter went into effect, and has not been repealed.

20. Section 3-702 (3) of the Philadelphia Home Rule Charter provides:

"Notwithstanding any other provisions of this chapter, the compensation of persons presently employed by the City shall be according to the presently existing classification and pay scale until civil service regulations are adopted as provided in this charter after which all persons subject to the civil service regulations shall be employed and compensated in accordance with such regulations."

21. On December 30, 1952, the Civil Service Commission of the City of Philadelphia approved a set of regulations, including Regulation 19, which dealt with classification of positions, pay scales, hours of work, holidays, vacation and sick leave; under Section 4(a) (3) of said Regulation 19

(now contained in Regulation 19.113, Regulation 19.26, Regulation 19.626) the plaintiffs and all members of the Police Department were placed on a 48-hour work week schedule. Said regulations were promulgated by Mayor Joseph S. Clark, Jr., one of the defendants herein, on December 31, 1952, effective January 1, 1953, on the ground of an emergency affecting the public health and safety. Copies of communications from Frank J. Escobedo, Personnel Director, to the Administrative Board, dated December 30, 1952, and from Frank J. Escobedo, Personnel Director, to Mayor Joseph S. Clark, Jr., Mayor of Philadelphia, dated December 30, 1952, an Order of the Mayor, dated December 31, 1952, are attached hereto and marked "Exhibits F and G," respectively.

22. Sections 4 and 5 of said Regulation 19 provided as follows:

"Section 4

(a) Normal work weeks—the basic work weeks for full time employees in the Civil Service are as follows:

(1) General

For all employees, except as provided below, the regular work week shall be 40 hours, consisting of 5 working days, Monday to Friday, inclusive, of 8 hours each.

(2) Clerical and Office

For clerical and office employees the work week shall be not less than 37½ hours nor more than 40 hours and the work day shall not be more than 8 hours as fixed pursuant to sub-paragraph (b) below.

(3) Police and Firemen

For all uniformed and investigatory personnel of the Fairmount Park Commission, police and fire departments, the regular work week shall be 48 hours, consisting of 6 working days of 8 hours each.

(4) Shift employees

The shift employees' work week shall consist of 40

hours, 5 days, 8 hours each, Monday to Sunday, inclusive.

(5) Exceptions

Because of the nature of certain types or classes of work may require deviation from the normal work weeks, including the hours worked per day and/or the numbers of days worked per week, application may be made to the Civil Service Commission for exceptions.

(b) Schedule of Work

The appropriate authority of each office, department, board, or commission shall, within 1 month of the adoption of this regulation, submit to the Personnel Director, in triplicate, for approval, a schedule of normal working hours for each organizational unit. Such schedule shall specify regular weekly hours and/or days of work for each class of employees with exceptions noted, if any. After approval by the Civil Service Commission and the Administrative Board, such schedules remain in effect until further revision has been similarly approved.

Section 5—Holidays

1. Employees who do not work at all on any of the said holidays shall receive their normal pay for the number of hours they would normally have worked on the particular day involved.

2. Any employee required to work on any of the above enumerated holidays, shall, in addition to his normal pay for the day, receive an additional day's pay at his regular rate of pay for the holiday work and double time for all hours worked over 8 hours on that day.

3. Provisions for holiday pay shall not be applicable to uniformed and investigatory personnel of the Police and Fire Departments and Fairmount Park Commission.

23. Said Philadelphia Emergency Civil Service Regulations, Supplemental Emergency Regulation A and the Civil Service Regulations dated December 30, 1952, purported to become effective prior to 30 days after their filing with the Department of Records and were, therefore, in violation of the provisions of Section 8-407(c) of the Philadelphia Home Rule Charter, and were of no effect and validity.

24. A search of the records of the Personnel Department, the Civil Service Commission and Department of Records fails to disclose a formal approval by the Administrative Board of the Philadelphia Emergency Civil Service Regulations and that portion of the Civil Service Regulations approved by the Civil Service Commission on December 30, 1952, pertaining to the position classification plan, pay plan, hours of work, holidays and annual vacation and sick leave, including Regulation 19 of said regulations and, therefore, said Regulation 19 of the said Philadelphia Emergency Civil Service Regulations dated January 7, 1952, and said Regulation 19 of the said Civil Service Regulations of December 30, 1952 are null and void, by reason of the failure to comply with Section 7-400 of the Philadelphia Home Rule Charter, requiring the approval of the Administrative Board.

25. The Philadelphia Emergency Civil Service Regulations, Supplemental Emergency Regulation A and the Civil Service Regulations approved by the Civil Service Commission on December 30, 1952 are null and void by reason of the failure to comply with Section 8-407(b) of the Philadelphia Home Rule Charter, in that the Department of Records failed to give adequate public notice by advertisement of the filing of said regulations, and did not adequately inform the public of the particular subjects which were the subject matter of said regulations and did not adequately inform the public of the contents of said regulations by proper and public notice thereof. Said Section 8-407(b) reads as follows:

"The Department of Records shall give public notice of such filing by advertising in the three daily newspapers of the City having the largest paid circulation the fact that regulations relating to a particular subject have been filed with it, and that any person affected thereby may request a hearing."

The advertisements of said regulations which appeared in the newspapers are attached hereto and marked Exhibits "H" and "I," respectively.

26. Said Philadelphia Emergency Civil Service Regulations, Supplemental Emergency Regulation A and Civil Service Regulations dated December 30, 1952 were and are invalid in that no emergency existed affecting the public health or safety which authorized the suspension of the requirements of Section 8-407 of the Philadelphia Home Rule Charter by Joseph S. Clark, Jr., Mayor of Philadelphia, one of the defendants herein.

27. Said Philadelphia Emergency Civil Service Regulations, Supplemental Emergency Regulation A and Civil Service Regulations dated December 30, 1952 were and are ineffective to repeal the Ordinances of Council of October 29, 1951 and January 2, 1952.

28. Regulation 19 of said Civil Service Regulations dated December 30, 1952 is contrary to Section 7, Article 3 of the Constitution of the Commonwealth of Pennsylvania, in that it is class legislation which grants special privileges to city employees other than policemen and park police.

29. Regulation 19 of said Philadelphia Emergency Civil Service Regulations, Supplemental Emergency Regulation A and Regulation 19 of said Civil Service Regulations dated December 30, 1952 violate the due process clause of the Fifth Amendment, and the due process and equal protec-

tion clauses of the Fourteenth Amendment of the Constitution of the United States.

30. Regulation 19 of said Civil Service Regulations dated December 30, 1952 was and is arbitrary and unreasonable and capriciously discriminates against policemen and park police when it requires policemen and park police, as distinguished from other city employees, to work a longer work week without just compensation.

31. The said plaintiffs, and all other policemen and park police, by virtue of the provisions of said ordinance of October 29, 1951, as amended by ordinance of January 2, 1952 and by virtue of Section 3-702(3) of the Philadelphia Home Rule Charter and Section A-110 of the Appendix thereto, were lawfully entitled to a work week schedule of 40 hours per week from January 1, 1952, at an annual salary of $4,000 for policemen and park police, which was increased to $4,500 on January 1, 1953.

32. Plaintiffs have made demand upon the defendants for the restoration to all the said plaintiffs (with the exception of Salvatore A. Maiorana and William Anson, presently on pension) and all other policemen and park police of the City of Philadelphia of the work week schedule of 40 hours per week, and for overtime back pay, to which the plaintiffs were lawfully entitled by virtue of the said ordinance of City Council of October 29, 1951, as amended, and Section 3-702(3) of the Philadelphia Home Rule Charter and Section A-110 of the Appendix thereto, but the said defendants have failed and refused to comply with said demand.

33. Plaintiffs are without other and adequate remedy at law.

WHEREFORE, plaintiffs pray that judgment be entered in favor of the plaintiffs and against the defendants and that defendants be commanded to restore the plaintiffs (with the exception of Salvatore Maiorana and William Anson, presently on pension) and all other policemen and park police to a work week schedule of 40 hours per week at an annual salary of $4,500 for policemen and to pay to the said plaintiffs and all other policemen and park police the difference between the 48 hour work week schedule performed by them and the said other policemen and park police since January 7, 1952 until the filing of said Amended Complaint and the 40 hour work week schedule authorized by law at overtime and other rate of pay proper under the circumstances, and grant the plaintiffs such other and further relief as may be deemed proper.

J. J. KILIMNIK,
Attorney for Plaintiffs.

APPENDIX B.

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APPENDIX C.

CHAPTER 4

CIVIL SERVICE: REGULATIONS

Section 7-400. Preparation and Adoption. The civil service regulations shall be prepared by the Personnel Director. Regulations pertaining to the position classification plan, pay plan, hours of work, holidays and annual vacation and sick leave shall be submitted by the Personnel Director for approval to the Civil Service Commission and Administrative Board. All other civil service regulations shall be submitted by the Personnel Director for approval to the Civil Service Commission only. After the requisite approvals shall have been obtained, the regulations shall be filed by the Personnel Director with the Department of Records, where they shall be available for public inspection for thirty days, and public notice of such filing shall be given as in the case of other regulations.

If any person affected by the proposed regulations or any citizen shall present to the Department of Records a written request therefor, he shall be afforded a public hearing before the Commission. The Commission may after a hearing re-affirm its approval or direct that the regulations be changed but any modification of a regulation which required initially the approval of the Administrative Board shall be submitted to it for approval. The subsequent procedure shall be the same as in the case of other regulations.

Section 7-401. Contents. The regulations shall provide for:

(a) The preparation, maintenance and revision of a position classification plan for all positions in the civil service, based upon similarity of duties performed and responsibili-

ties assumed, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class;

(b) A pay plan for all employees in the civil service. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed;

(c) Open competitive examinations to test the relative fitness of applicants for the respective positions. Such examinations need not be held until after the regulations have been adopted, the service classified and a pay plan established, but must be held not later than one year after this charter takes effect. Such examinations shall be announced publicly at least fifteen days in advance and shall be appropriately advertised;

(d) The granting, as may from time to time be required by statute or ordinance, of preference in entrance examinations to qualified persons who have been members of the armed forces of the United States;

(e) Promotions which shall give appropriate consideration to the applicant's qualifications, record of performance, seniority and conduct. Vacancies shall be filled by promotion whenever possible, and promotion shall be on a competitive basis except where the Personnel Director with the approval of the Civil Service Commission finds that competition is impracticable;

(f) The establishment of eligible lists for appointment and promotion, upon which lists shall be placed the names of successful candidates in the order of their relative excellence in the respective examinations. Such lists shall continue in force for at least one year from the date of their establishment and thereafter until exhausted or replaced

by more recently prepared lists but in no case longer than two years. All such lists shall be available for public inspection;

(g) The rejection of candidates or eligibles who fail to comply with reasonable requirements in regard to such factors as age, physical condition, training and experience, or who have attempted any deception or fraud in connection with an examination;

(h) For the certification of the two persons standing highest on the appropriate eligible list to fill a vacancy. After an eligible has been rejected twice by an appointing authority in favor of others on the same eligible list, such name shall not again be certified to that appointing authority, except upon written request from the appointing authority but the passing over of a non-veteran eligible in order to appoint a veteran shall not constitute a rejection;

(i) The institution of accepted permanent identification methods for all employees in the civil service;

(j) A period of probation not to exceed six months before appointment or promotion may be made complete, and during which period a probationer may, with the consent of the Personnel Director, be discharged or reduced in class or rank, or replaced on the eligible list;

(k) Provisional and emergency appointments without examination, and temporary appointments. Provisional appointments may be made only with the concurrence of the Personnel Director and in the absence of an appropriate eligible list and shall continue only until an appropriate eligible list can be established and certification made therefrom, but in no event for more than ninety days in any twelve month period, except during the first year after the effective date of this charter in order to avoid stoppage of

the orderly conduct of the business of the City. Emergency appointments may be made only in case of an unforeseen emergency to prevent serious impairment of the public business and shall continue only during the period of the emergency and in no event longer than thirty days. Temporary appointments may be made with or without examination to positions that will not continue longer than six months. No person may serve as a temporary appointee for longer than six months in any twelve month period;

(l) The appointment of unskilled laborers after such qualifying tests of fitness as the Personnel Director may prescribe;

(m) Transfer from one position to a similar position in the same class and level of responsibility, and for reinstatement within one year of persons who resign in good standing or who are laid off from their positions without fault or delinquency on their part;

(n) The establishment of a system for determining and reviewing, and the keeping of records of, annual efficiency ratings of performance of all employees in the civil service, which efficiency ratings shall be considered in determining salary increases and decreases provided in the pay plan, as a factor in promotion tests, as a factor in determining the order of lay-offs because of lack of funds or work and for reinstatement, and as a factor in demotions, discharges and transfers;

(o) Lay-offs by reason of lack of funds or work, or abolition of a position, or material change in duties or organization, and for reinstatement of employees laid off, or who resigned or were granted leaves of absence;

(p) Suspensions from the service for not longer than thirty days;

(q) Discharge or reduction in rank or grade after appointment or promotion is completed only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction, specifically stated, and has been allowed a reasonable time to reply thereto in writing. The reasons and the reply shall be filed with the Personnel Director;

(r) Hours of work, holidays, attendance regulations, and special leaves of absence in the various classes of positions in the civil service;

(s) A system permitting employees appropriate annual vacation and sick leave;

(t) The development and operation of programs to improve the work effectiveness and morale of employees of the City, including safety, health, welfare, recreation, training and education and labor relations, including grievances and hearings thereon;

(u) Such residence qualifications for employees in the civil service as the Council may from time to time require but the Civil Service Commission may, upon the request of the Personnel Director, waive any such requirements whenever, in its discretion, the circumstances warrant such waiver;

(v) Such other matters as may be proper and necessary.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BAXTER ET AL. *v.* CITY OF PHILADELPHIA ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 858. Decided January 15, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.